

No. 12680

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United States  
Court of Appeals  
for the Ninth Circuit.

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UNITED STATES OF AMERICA,  
Appellant,  
vs.

A. LESTER MARKS, ELIZABETH LOY  
MARKS, and HERBERT M. RICHARDS,  
Trustees of the Estate of L. L. McCANDLESS,  
Deceased,  
Appellees.

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Transcript of Record

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FILED

NOV 22 1950

Appeal from the United States District Court,  
for the Territory of Hawaii.

PAUL P. O'BRIEN,  
CLERK



No. 12680

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United States  
Court of Appeals  
for the Ninth Circuit.

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UNITED STATES OF AMERICA,  
Appellant,  
vs.

A. LESTER MARKS, ELIZABETH LOY  
MARKS, and HERBERT M. RICHARDS,  
Trustees of the Estate of L. L. McCANDLESS,  
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Appellees.

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Transcript of Record

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Appeal from the United States District Court,  
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS  
OF RECORD

For the Plaintiffs, A. Lester Marks, Elizabeth Loy Marks, and Herbert M. Richards, Trustees of the Estate of L. L. McCandless, deceased:

ROBERTSON, CASTLE & ANTHONY,  
312 Castle & Cooke Bldg.,  
Honolulu 1, Hawaii.

For the Defendant, United States of America:

FRED K. DEUEL, ESQ.,  
Special Attorney, Department of Justice,  
Federal Building,  
Honolulu, T. H.

In the District Court of the United States  
For the Territory of Hawaii

Civil No. 886

A. LESTER MARKS and BISHOP TRUST  
COMPANY, LIMITED, Executor, Administra-  
tor, C.T.A. and Trustees of the Estate of L. L.  
McCandless, Deceased,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

### COMPLAINT

Come now A. Lester Marks, Executor and Trustee, and Bishop Trust Company, Limited, Administrator-with-the-Will-Annexed and Trustee, of the Estate of L. L. McCandless, deceased, plaintiffs above named, and complaining of the defendant above named, for cause of action, allege as follows:

1.

Jurisdiction of this court is founded on Private Law 433—80th Congress, Second Session, approved June 30, 1948, a copy of which is hereto attached and marked "Exhibit A."

2.

On December 7, 1941, plaintiffs were the owners of a ranch at Makua and Waianae, Oahu, Territory of Hawaii, and that on said day and immediately subsequently, the Armed Forces of the United



States entered upon said ranch, took possession of the premises and destroyed fences, paddocks and corrals causing the livestock on the ranch to disperse and scatter over the countryside resulting in a loss of personal property of plaintiffs in the sum of \$46,155.00.

3.

Plaintiffs on December 7, 1941, were the holders of two leases, being General Leases Nos. 1740 and 1741, from the Commissioner of Public Lands of the Territory of Hawaii, demising lands in Waianae and Waialua districts, Island of Oahu, Territory of Hawaii, aggregating 4792.72 acres in area for terms of 21 years from December 29, 1925. On July 2, 1942, plaintiffs were notified by the Commissioner of Public Lands that upon the request of Lt. General Delos C. Emmons, the land covered by General Lease No. 1740 "is hereby cancelled, effective June 29, 1942," and by a similar letter dated July 28, 1942, the Commissioner of Public Lands notified the plaintiffs that General Lease No. 1741 "is hereby cancelled, effective December 29, 1942"; that the defendant occupied the lands covered by the leases for the remainder of their terms which expired December 29, 1946; that the purported cancellation was without any right given under the provisions of said leases and was without right or authority conferred on the Commissioner of Public Lands under the laws of the United States or the Territory of Hawaii and was to the damage of plaintiffs in the sum of \$67,500.00.

Wherefore, plaintiffs demand judgment in the total sum of \$113,615.00.

Dated: Honolulu, Hawaii, December 13, 1948.

/s/ J. GARNER ANTHONY,  
Attorney for Plaintiffs.

ROBERTSON, CASTLE &  
ANTHONY,  
Of Counsel.

Exhibit A

(Private Law 433—80th Congress)  
(Chapter 747—2d Session)  
(H. R. 915)

### An Act

To confer jurisdiction upon the District Court of the United States for the Territory of Hawaii to hear, determine, and render judgment on the claims of the executors and trustees of the estate of L. L. McCandless, deceased, as their interests may appear against the United States of America.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That jurisdiction is hereby conferred upon the District Court of the United States for the Territory of Hawaii to hear, determine, and render judgment upon the claims of the executors and trustees of the estate of L. L. McCandless, deceased, as their interests may appear, against the United States of America for damages, if any, but not exceeding the sum of \$46,155, for the loss of

personal property including the loss of livestock, alleged to have been caused by military personnel of the United States, and for damages, if any, but not exceeding the sum of \$67,500 for the alleged illegal withdrawal of the Government lands covered by General Leases Numbers 1740 and 1741 of the Territory of Hawaii, each dated December 29, 1925, from the operation of those leases for use by the United States Army for war purposes: Provided, That judgment shall not be rendered against the United States with respect to any part of the alleged damages for the loss of personal property, including livestock, which arose out of the combat activities of military personnel of the United States.

Sec. 2. Proceedings for the determination of these claims shall be had in the same manner as in cases against the United States of which the district courts of the United States have jurisdiction under the provisions of section 24 of the Judicial Code, as amended: Provided, that suit hereunder shall be instituted within one year after the enactment of this Act: And provided further, That this Act shall be construed only to waive the immunity from suit of the Government of the United States and to confer jurisdiction upon said court to hear, determine, and render judgment upon the claims of the executors and trustees of the estate of L. L. McCandless, deceased, described in section 1 hereof, and not otherwise to affect any substantive rights of the parties.

Approved June 29, 1948.

[Endorsed]: Filed December 14, 1948.

[Title of District Court and Cause.]

### SUMMONS

To the United States of America, Defendant:

You are hereby summoned and required to serve upon J. Garner Anthony of Roberston, Castle & Anthony, 312 Castle & Cooke Building, Honolulu, Hawaii, an answer to the Complaint which is herewith served upon you within sixty (60) days after service of this Summons upon you, exclusive of the day of service.

If you fail to do so, judgment by default will be taken against you for the relief demanded in the Complaint.

Dated: Honolulu, Hawaii, December 14th, 1948.

[Seal]      /s/ WM. F. THOMPSON, JR.,  
Clerk of Court.

(This Summon is issued pursuant to Rule 4,  
of the Federal Rules of Civil Procedure).

Receipt of Copy attached.

Marshal's Return attached.

[Title of District Court and Cause.]

## ANSWER

The defendant, by W. Braxton Miller, Special Assistant to the Attorney General of the United States, and acting under his instructions, for its answer says:

### First Defense

The complaint fails to state a claim upon which relief can be granted.

### Second Defense

The complaint fails to state a claim within the jurisdiction conferred upon this Court by Private Law 433, 80th Cong., 2d Sess., approved June 30, 1948.

### Third Defense

1. The defendant is without information sufficient to form a belief with respect to the allegation in paragraph 2 that the plaintiffs on December 7, 1941, were the owners of a ranch at Makua and Waianae, Oahu, Territory of Hawaii. The defendant denies the remaining allegations in paragraph 2 of the complaint.

2. The defendant is without information sufficient to form a belief with respect to the truth or falsity of the allegations of ownership and cancellation of leases Nos. 1740 and 1741 that it occupied the lands covered by the leases for the period of time alleged. The defendant denies that the cancella-



tion was unauthorized and invalid. The defendant denies that plaintiffs have been damaged as alleged in paragraph 3 of the complaint.

Wherefore defendant demands that the complaint be dismissed and that it be awarded its costs.

/s/ W. BRAXTON MILLER,  
Special Assistant to,  
The Attorney General.

Service accepted this 17th day of January, 1949.

/s/ J. GARNER ANTHONY,  
Attorney for Plaintiffs.

[Endorsed]: Filed January 17, 1949.

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[Title of District Court and Cause.]

### FIRST AMENDED ANSWER

The defendant, by Fred K. Deuel, Special Attorney, Department of Justice, hereby amends its answer to read as follows:

#### First Defense

The complaint fails to state a claim upon which relief can be granted.

#### Second Defense

The complaint fails to state a claim within the jurisdiction conferred upon this Court by Private Law 433, 80th Cong., 2d Sess., approved June 30, 1948.

### Third Defense

1. The defendant is without information sufficient to form a belief with respect to the allegation in paragraph 2 that the plaintiffs on December 7, 1941, were the owners of a ranch at Makua and Waianae, Oahu, Territory of Hawaii. The defendant denies the remaining allegations in paragraph 2 of the complaint.

2. The defendant is without information sufficient to form a belief with respect to the truth or falsity of the allegations of ownership and cancellation of leases Nos. 1740 and 1741 that it occupied the lands covered by the leases for the period of time alleged. The defendant denies that the cancellation was unauthorized and invalid. The defendant denies that plaintiffs have been damaged as alleged in paragraph 3 of the complaint.

### Fourth Defense and Claim of Setoff

Following the termination of the leases referred to in the complaint the defendant expended the sum of \$23,868.52 in the construction of buildings and facilities on other lands owned by the plaintiffs. These expenditures were made in connection with removal of the plaintiffs' ranch activities from the leased property to said other lands. Should damages be awarded based upon termination of the leases, the defendant prays that it be allowed the aforesaid sum of \$23,868.52, as a setoff.

## Fifth Defense

The Plaintiff acquiesced in the cancellation of leases Nos. 1740 and 1741 and in the occupancy by the defendant of the land covered by said leases.

Wherefore defendant demands that the complaint be dismissed and that it be awarded its costs.

/s/ FRED K. DEUEL,  
Special Attorney,  
Department of Justice.

Consent is hereby given to the foregoing amendment and service is accepted this 13th day of January, 1950.

/s/ J. GARNER ANTHONY,  
Attorney for Plaintiffs.

[Endorsed]: Filed January 13, 1950.

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[Title of District Court and Cause.]

## MOTION TO DISMISS

Comes now the defendant, United States of America, by Fred K. Deuel, Special Attorney, Department of Justice, and now at the conclusion of all the evidence, hereby moves the Court for an order dismissing that portion of the plaintiff's complaint set forth in Paragraph 3 thereof on the ground that on the facts and the law, the plaintiff has shown no right to relief and more specifically on the following grounds:



1. Private Law 433-80th Congress, under which the action is brought, does not encompass a suit for or recovery for use and occupancy.

2. There is no cause of action stated in said Paragraph 3 as against the defendant, United States of America.

3. General Leases Nos. 1740 and 1741 mentioned in said Paragraph 3, were in fact validly cancelled by action of the Commissioner of Public Lands for the Territory of Hawaii.

4. No compensable interest exists in favor of the plaintiff as against the United States of America for the use and occupancy of the lands covered by General Leases Nos. 1740 and 1741.

5. The plaintiff in fact acquiesced in the cancellation of General Leases Nos. 1740 and 1741.

Respectfully submitted,

UNITED STATES OF  
AMERICA,  
Defendant.

By /s/ FRED K. DEUEL,  
Special Attorney,  
Department of Justice.

[Endorsed]: Filed April 3, 1950.

[Title of District Court and Cause.]

### AMENDED COMPLAINT

Come now A. Lester Marks, Elizabeth Loy Marks and Herbert M. Richards, Trustees of the Estate of L. L. McCandless, deceased, plaintiffs above named, and complaining of the defendant above named, for cause of action, allege as follows:

#### 1.

Jurisdiction of this Court is founded on Private Law 433, 80th Congress, Second Session, approved June 30, 1948, a copy of which is attached to the original complaint and incorporated herein by reference.

#### 2.

On December 7, 1941, the Estate of L. L. McCandless, deceased, was the owner of a ranch at Makua and Waianae, Oahu, Territory of Hawaii, and that on said day and immediately subsequently, the Armed Forces of the United States entered upon said ranch, took possession of the premises and destroyed fences, paddocks and corrals causing the livestock on the ranch to disperse and scatter over the countryside resulting in a loss of personal property of plaintiffs in the sum of \$46,-155.00; that plaintiffs are the duly appointed, qualified and acting Trustees of the Estate of L. L. McCandless, deceased.

#### 3. .

That said Estate on December 7, 1941, held two leases, being General Leases Nos. 1740 and 1741,

from the Commissioner of Public Lands of the Territory of Hawaii, demising lands in Waianae and Waialua districts, Island of Oahu, Territory of Hawaii, aggregating 4792.72 acres in area for terms of 21 years from December 29, 1925. On July 2, 1942, said Estate was notified by the Commissioner of Public Lands that upon the request of Lt. General Delos C. Emmons, the land covered by General Lease No. 1740 "is hereby cancelled, effective June 29, 1942," and by a similar letter dated July 28, 1942, the Commissioner of Public Lands notified said Estate that General Lease No. 1741 "is hereby cancelled, effective December 29, 1942"; that the defendant occupied the lands covered by the leases for the remainder of their terms which expired December 29, 1946; that the purported cancellation was without any right given under the provisions of said leases and was without right or authority conferred on the Commissioner of Public Lands under the laws of the United States or the Territory of Hawaii and was to the damage of plaintiffs in the sum of \$67,500.00, for the taking of said leasehold and the use and occupation of said lands.

Wherefore, plaintiffs demand judgment in the total sum of \$113,615.00.

Dated: Honolulu, Hawaii, April 12, 1950.

/s/ J. GARNER ANTHONY,  
Attorney for Plaintiffs.

ROBERTSON, CASTLE &  
ANTHONY,  
Of Counsel.

Receipt of Copy Acknowledged.

[Endorsed]: Filed April 12, 1950.

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[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS  
OF LAW

This cause having come on for hearing, jury waived, pursuant to Private Law 443, Ch. 747, 2d Sess., 80th Cong., and the Court having heard the evidence, finds the facts and states the conclusions of law as follows:

Findings of Fact

1.

That A. Lester Marks, Elizabeth Loy Marks and Herbert M. Richards are the duly appointed, qualified and acting trustees of the Estate of L. L. McCandless, deceased, and are as such trustees the owners and holders of the claim of said estate against defendant hereafter referred to.

2.

That on December 7, 1941, the Estate of L. L. McCandless, deceased, was the owner of a cattle ranch at Makua and Waianae on the island of Oahu, Territory of Hawaii.

3.

That included in said ranch were two tracts of land under General Leases 1740 and 1741, from the Commissioner of Public Lands of the Territory of Hawaii, containing an area of 4,783.88 acres, said leases were for a term of 21 years beginning December 29, 1925.

4.

That on December 7, 1941, military personnel of the defendant entered into possession of plaintiffs' ranch and thereafter occupied the entire premises, disrupting plaintiffs' ranching operations; that upon the initial entry only a small number of troops occupied portions of the ranch premises along the coastline, but subsequently in the year 1942, a substantial number of military personnel was deployed throughout the premises together with their equipment; that the military personnel so entering upon the plaintiffs premises were not engaged in combat activities.

5.

That as a direct result of the activities of the military personnel on the premises, fences, paddocks and corrals were destroyed and caused livestock of plaintiffs to be dispersed throughout the country-



side which resulted in damage to the plaintiffs as follows:

(a)	287 head of cattle lost.....	\$12,915.00
(b)	Cost to plaintiffs of recovering stray cattle .....	2,079.00
(c)	200 pigs .....	3,000.00
(d)	2 horses .....	250.00
(e)	Loss of 500 bags, 400 bags of algaroba beans and 200 redwood posts .....	190.00
(f)	Value of General Leases 1740 and 1741 for $4\frac{1}{3}$ years .....	41,460.29
(g)	Rental value of house and guest cottage .....	6,000.00
Total .....		\$65,894.29

## 6.

That the injuries and damages and loss of personal property and loss of said leaseholds did not arise out of the combat activities of the military personnel of the United States.

## 7.

That the construction by the United States of certain improvements on land owned in fee simple by the Estate of L. L. McCandless was made without reference to the claim, the subject matter of this action, and is irrelevant to plaintiffs' recovery herein and that defendant has failed to establish said set-off by a preponderance of the evidence and it is therefore denied.

8.

That plaintiffs did not acquiesce in the cancellation of General Leases 1740 and 1741, but were obliged to and did in fact peacefully surrender possession and occupancy of the land thereby demised to defendant without surrendering their right to receive just compensation for said taking.

Conclusions of Law

1.

That this Court has jurisdiction of the claim pursuant to Private Law 433, 80th Congress, 2d Session, approved June 29, 1948.

2.

That the occupancy and possession of the lands described in General Leases No. 1740 and 1741 was without lawful authority and that the action of the Commissioner of Public Lands purporting to withdraw said leases for the use of military personnel did not constitute a withdrawal for public purposes of the Territory of Hawaii as provided in the Hawaiian Organic Act and the leases referred to and that plaintiffs are entitled to just compensation for the taking of said leaseholds.

3.

The Court having found that plaintiffs have established the allegations of the amended complaint by a preponderance of the evidence and having further found that defendant failed to establish its set-off that therefore judgment should be en-

tered in favor of plaintiffs and against defendant in the sum of \$65,894.29.

Dated: Honolulu, Hawaii, April 18th, 1950.

/s/ D. E. METZGER,  
District Judge.

[Endorsed]: Filed April 19, 1950.

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In the District Court of the United States  
For the Territory of Hawaii

Civil No. 886

A. LESTER MARKS, ELIZABETH LOY  
MARKS and HERBERT M. RICHARDS,  
Trustees of the Estate of L. L. McCandless,  
Deceased,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

### JUDGMENT

This cause came on to be heard before the Court, sitting without a jury, and the Court having entered findings of fact and conclusions of law,

It Is Hereby Ordered, Adjudged and Decreed that plaintiffs recover of defendant, the sum of \$65,894.29, together with interest thereon at the rate of 6% per annum from the date hereof until paid.



Dated: Honolulu, Hawaii, April 19th, 1950.

By the Court:

/s/ WM. F. THOMPSON, JR.,  
Clerk.

Docketed April 19, 1950.

[Endorsed]: Filed April 19, 1950.

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In the District Court of the United States  
For the Territory of Hawaii  
Civil No. 886

A. LESTER MARKS, ELIZABETH LOY  
MARKS and HERBERT M. RICHARDS,  
Trustees of the Estate of L. L. McCandless,  
Deceased,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,  
Defendant.

### AMENDED JUDGMENT

This cause came on to be heard before the Court, sitting without a jury, and the Court having entered findings of fact and conclusions of law,

It Is Hereby Ordered, Adjudged and Decreed that plaintiffs recover of defendant, the sum of \$65,-894.29, together with interest thereon as provided by law.

Dated: Honolulu, Hawaii, April 25th, 1950.

By the Court:

/s/ WM. F. THOMPSON, JR.,  
Clerk.

[Endorsed]: Filed April 25, 1950.

Docketed April 25, 1950.

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[Title of District Court and Cause.]

### NOTICE OF APPEAL

Notice is hereby given that the United States of America, defendant herein, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the entire final Judgment entered as to the above cause on April 19, 1950, as said Judgment was amended by Amended Judgment entered on April 25, 1950.

Dated: Honolulu, T. H., this 16th day of June, 1950.

UNITED STATES OF  
AMERICA,

By /s/ FRED K. DEUEL,  
Special Attorney,  
Department of Justice.

[Endorsed]: Filed June 16, 1950.

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO DOCKET  
RECORD ON APPEAL

For good cause shown and in the discretion of  
the Court,

It Is Hereby Ordered that Petitioner, United  
States of America, shall have ninety (90) days from  
June 16, 1950, the date of Notice of Appeal, to  
file the record on appeal in the above-entitled case  
and to docket the same in the United States Circuit  
Court of Appeals for the Ninth Circuit.

Dated: Honolulu, T. H., this 18th day of July,  
1950.

/s/ D. E. METZGER,

Judge of the United States District Court for the  
District of Hawaii.

[Endorsed]: Filed July 18, 1950.

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[Title of District Court and Cause.]

DESIGNATION OF THE CONTENTS  
OF THE RECORD ON APPEAL

The United States of America, appellant in the  
above-entitled cause, designates for inclusion in  
the record on appeal the following:

1. The complete record and all the proceedings  
and evidence in the action.

2. This designation of the contents of the record on appeal.

UNITED STATES OF  
AMERICA,  
Appellant.

By /s/ FRED K. DEUEL,  
Special Attorney,  
Department of Justice.

[Endorsed]: Filed August 23, 1950.

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[Title of District Court and Cause.]

AMENDED DESIGNATION OF THE  
CONTENTS OF THE RECORD ON  
APPEAL

The United States of America, appellant in the above-entitled cause, designates for inclusion in the record on appeal the following:

1. The complete record and all the proceedings and evidence in the action.

2. The stipulation and order thereon in Civil Action No. 485 filed and entered in the above-designated Court on July 1, 1949, being the settlement referred to at page 90 of the transcript of proceedings of the above-designated case and of which the Court took judicial notice. A certified copy of said stipulation and order is attached hereto.

3. This designation of the contents of the record on appeal.

UNITED STATES OF  
AMERICA,  
Appellant.

By /s/ FRED K. DEUEL,  
Special Attorney,  
Department of Justice.

Receipt of a copy of the foregoing designation is hereby acknowledged this 8th day of September, 1950, and objects to the inclusion of the stipulation in Civil 485 as not a proper part of the record on appeal in the above cause.

/s/ J. GARNER ANTHONY,  
Counsel for Appellee.

In the District Court of the United States for the  
District of Hawaii, April Term, 1949

Civil No. 485

UNITED STATES OF AMERICA,

Petitioner,

vs.

165.847 Acres of land, more or less, situate in  
Waianae, Oahu, Territory of Hawaii, Oahu  
Railway and Land Company, a corporation;  
et al.,

Defendants.

### STIPULATION

It Is Hereby Stipulated by and between petitioner, United States of America, and the defendants, A. Lester Marks, Executor under the last Will and Testament of L. L. McCandless, deceased, Bishop Trust Company, Ltd., Administrator with the Will annexed of the Estate of L. L. McCandless, deceased, A. Lester Marks, Elizabeth Loy Marks and Elizabeth Janet Cartwright McCandless, Trustees under the Will and of the Estate of L. L. McCandless, deceased, all acting by and through Robertson, Castle and Anthony, their attorneys of record, as follows:

(1) That the fair market value and just compensation which should be paid for the taking of the full, free and unencumbered fee simple title to Parcels 2, 3, 4, 5, 6, 7, 11, 12, 13, 14, 15, 16, 18 and 19, as described in the petition of condemnation as



amended and declaration of taking as amended filed herein, is the sum of \$65,000.00, and which sum includes any interest due or that may become due on the difference between the deposits made on account of just compensation for said parcels at the time of the filing of said declaration of taking and the amount herein agreed upon as the total just compensation for the taking of said parcels of land, except as hereinafter provided.

(2) That petitioners shall within 60 days after the entry of an order fixing said just compensation as herein agreed upon, deposit or cause to be deposited in the registry of this court the difference between the agreed just compensation and the deposits made on account of the just compensation for the taking of said parcels at the date of the filing of said declaration of taking, and in the event that said petitioners shall fail to deposit said deficiency within said 60-day period then petitioner shall also pay interest at the rate of 6% on said deficiency from the end of said 60-day period and until such deposit is made.

(3) It is further understood and agreed that out of said agreed just compensation there shall be paid any claims, judgments, liens or encumbrances existing against such parcels of said land at the time of the taking by the Government on March 23, 1943, and there shall be paid out of said sum of \$65,000.00 to Clement Paiaina and Sybil Davis as Statutory Administratrix of the Estate of Rachael Paiaina Poe, deceased, the fair value and just compensa-

tion which may be determined to represent the value of their interests in and to Parcel 6 at the time of the taking herein; and to Dorothy K. Otholt Passos, the fair value and just compensation which may be determined to be due her for her interest in Parcel 2 at the time of the taking herein.

(4) It is understood and agreed that said sum of \$65,000.00 represents the total just compensation required to be paid for all interest in and to said parcels hereinbefore identified.

(5) It is further agreed that at the time of the filing of the declaration of taking herein there was deposited on account of just compensation or as the estimated just compensation for the taking of said parcels hereinbefore identified, the sum of \$18,178.00, and that the sum of \$46,822.00 represents the deficiency between said total of deposits and the agreed just compensation of \$65,000.00.

(6) It is stipulated and agreed that an order and judgment may be made and entered hereon and conforming to the terms of said stipulation.

Dated: Honolulu, T. H., this 30th day of June, 1949.

THE UNITED STATES OF  
AMERICA,

By /s/ HARRY T. DOLAN,  
Special Assistant to the  
Attorney General.



ROBERTSON, CASTLE &  
ANTHONY,

Attorneys for the  
Defendants Named Herein.

By /s/ J. GARNER ANTHONY.

So Ordered this 30th day of June, 1949.

/s/ J. FRANK McLAUGHLIN,  
Judge of the United States District Court for the  
District of Hawaii.

A True Copy.

Filed July 1, 1949.

[Endorsed]: Filed September 8, 1950.

In the District Court of the United States  
for the Territory of Hawaii

Civil No. 886

A. LESTER MARKS, ELIZABETH LOY  
MARKS and HERBERT M. RICHARDS,  
Trustees of the Estate of L. L. McCandless,  
Deceased,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

TRANSCRIPT OF PROCEEDINGS

February 14, 15, 16 and 17, 1950

Before: Hon. Delbert E. Metzger,  
Judge.

Appearances:

J. GARNER ANTHONY, Esq.,  
312 Castle & Cooke Building, Honolulu,  
T. H., Appearing on Behalf of the Plaintiff.

FRED K. DEUEL, Esq.,  
Special Attorney, Department of Justice,  
Appearing on Behalf of the Defendant.

The Clerk: Civil No. 886, A. Lester Marks and  
Bishop Trust Company, Limited, Executor, Admin-  
istrator and Trustee of the Estate of L. L. McCand-  
less, Deceased, Plaintiffs, vs. United States of  
America, for trial.

The Court: Who leads?

Mr. Anthony: We have the burden of proof, your Honor. I would like to make a brief statement, if that would be desired by the Court.

The Court: Yes.

Mr. Anthony: This case, if the Court please, is an action brought under a private law, Act of Congress, which confers jurisdiction upon this Court to hear, jury waived, the claim of the Estate of L. L. McCandless against the United States for the damage and destruction of certain property in the Waianae District located at the McCandless Ranch, and for the unlawful possession, cancellation, and termination of the lease which the Estate had from the Territory of Hawaii on the premises. The statute itself, under which we are proceeding, confers jurisdiction upon this Court "to hear, determine, and render judgment upon the claims of the executors and trustees of the estate of L. L. McCandless, deceased, as their interests may appear, against the United States of America for damages, if any, but not exceeding the sum of \$46,155, for the loss of personal property including the loss of livestock, alleged to have been caused by military personnel of the United States, and for damages, if any, but not exceeding the sum of \$67,500 for the alleged illegal withdrawal of the Government lands covered by General Leases Numbers 1740 and 1741 of the Territory of Hawaii, each dated December 29, 1925, from the operation of those leases for use by the United States Army for war purposes: Provided,

That judgment shall not be rendered against the United States with respect to any part of the alleged damages for the loss of personal property, including livestock, which arose out of the combat activities of military personnel of the United States.”

The claim, as I have stated, is in two parts. The first relates to the personal property and the second part of the claim relates to the unlawful withdrawal by the Territory of the leases 1740——

The Court: Was that an unlawful withdrawal?

Mr. Anthony: Oh, yes, your Honor. That is a question of law which we will argue at the conclusion of the case or at such time as your Honor may designate. The situation as to that, in brief, is this: The two leases in question were executed in 1925 and contained a right of withdrawal reserved to the Territory for public purposes and for sale in the event the Territory wanted to sell them. The [2\*] public purposes as stated in the lease and as that language was used in the Organic Act at the time the leases were executed, were public purposes of the Territory of Hawaii. Thereafter, in August of 1941, the Organic Act was amended to include a withdrawal for purposes of the United States. It is our contention, as a matter of law, that this was not a retroactive provision. In other words, you could not thus impair the obligation of the lease. All that amendment meant was that from and after the date of the amendment any lease would be subject to withdrawal for purposes, not only public

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\* Page numbering appearing at top of page of original Reporter's Transcript of Record.

purposes of the Territory, but public purposes of the United States. We have authorities to support the proposition that in such an instance the statute is not retroactive in its operation. This case is not the same as the case that was before the Court in *United States vs. Chun Chin*.

The Court: I recollect.

Mr. Anthony: Your Honor tried a proceeding in which the United States sought to condemn certain parcels of land, some of which were owned by the Territory. Thereafter the United States endeavored to discontinue and to procure by executive order the land in question, and the judgment of the Court of Appeals was that the United States had the right to proceed in that administrative way to vest the title in the United States. However, the Court of Appeals was very careful to point out in that case that the possession of the [3] lessee was not disturbed by the United States, and I believe they stated, if that had been the fact, then, of course, there would be an appropriate action for compensation.

The statute in this case, Private Law No. 433 of the 80th Congress, Second Session, expressly confers jurisdiction upon this Court to hear and pass on, not only the question of the damages to the personal property, but on the question of the invalidity of that alleged cancelation, which we contend is of no force and effect and is void. We are ready to proceed, your Honor, with our witnesses.

The Court: Do you want to make any statement?



Mr. Deuel: I have no particular opening statement at the moment, your Honor, except that the Government disagrees with Counsel in regard to whether or not the amendment that he spoke of to the Organic Act in 1941 was pertinent to this issue. I believe there should be a determination regarding this question as to the cancelation of these leases, if possible, at an early stage of the case, for the reason that if your Honor should rule with the Government on that it will avoid the necessity of calling and putting on witnesses with regard to these leases and evaluation and cut out considerable time in trial. By agreement with Counsel we have some joint exhibits to go in, and at that point I would like to make a motion that your Honor determine that question.

Mr. Anthony: So far as time is concerned, we will [4] probably be finished today, your Honor, certainly not later than tomorrow noon. It is a very short matter.

The Court: Your case will cover that?

Mr. Anthony: Yes, I mean including that. I would say in a day and a half we would certainly finish.

The Court: Then you can attack that, I think, following. I don't know that anything would be gained by just dealing with that feature as a first thing. I am willing to hear Counsel on that point.

Mr. Anthony: We have some exhibits, your Honor.

The Court: It seems to me if you think you can get through today it would be better for you to proceed in your own fashion.

Mr. Anthony: At this time we would like to offer in evidence an exhibit which has been agreed upon between Counsel, being a geographical survey map of a portion of the Waianae District, which has indicated in blue pencil the areas covered by Lease No. 1741 and 1740.

The Court: No objection?

Mr. Deuel: These are joint exhibits right now which have been agreed upon, your Honor.

The Court: Received in evidence.

The Clerk: Joint Exhibit A.

(Thereupon, the document above referred to was received in evidence as Joint Exhibit A.) [5]

Mr. Anthony: We have a second joint exhibit, your Honor, which consists of the following: General Lease No. 1740, dated December 29, 1925.

The Court: 29 or 9?

Mr. Anthony: December 29, 1925, for a term of 21 years. As a part of that same exhibit, Assignment of Lease, dated March 21, 1928, from the original lessor, James F. Woods to L. L. McCandless; and a third document being a letter dated July 2, 1942.

The Court: All in one exhibit?

Mr. Anthony: Yes, they are all germane to the same lease, your Honor.

The Court: Yes.

Mr. Anthony: July 2, 1942, from L. M. Whitehouse, Commissioner of Public Lands, to Bishop Trust Company, Ltd., and Lester A. Marks, Trus-



tees of the Estate of L. L. McCandless, Deceased. I think I might read this letter to your Honor so you can get the purport of it, if you would like to have it read at this time.

“Gentlemen:

“Please be informed that request has been made by Lieutenant General Delos C. Emmons, by letter dated June 17, 1942, to Governor J. B. Poindexter, that all of the government land of Kahanahaiki and Makua in Makua Valley, Waianae, Oahu, be made immediately available to the Army [6] for war purposes.

“As the greater portion of the land in Makua Valley is covered by General Lease No. 1740 held by the L. L. McCandless Estate, wherein said lease provision is made for the withdrawal of any or all of the land covered thereby whenever it is required for any public purpose, therefore, pursuant to the request of Lieutenant General Delos C. Emmons, all of the land of Kahanahaiki and Makua in Makua Valley, Waianae, covered by General Lease No. 1740 is hereby withdrawn from the operation thereof for public purpose, to wit: For use by the Army for war purposes.

“General Lease No. 1740 is hereby cancelled effective June 29, 1942, the date to which rent under this lease has been paid.

“Very truly yours,

“/s/ L. M. W.

“L. M. WHITEHOUSE,

“Commissioner of  
Public Lands.”

The Court: That was to whom?

Mr. Anthony: That was to the Trustees, Bishop Trust Company, Ltd., and Lester A. Marks, Trustees of the Estate of L. L. McCandless, Deceased.

The Court: That was canceled solely upon the authority contained in the lease that it could be canceled for public purposes? [7]

Mr. Anthony: Yes. At that point, to have that problem in mind, it might be desirable to read the cancellation clause, if I may, your Honor.

The Court: Yes.

Mr. Anthony (Reading): "It Is Mutually Agreed, That at any time or times during the term of this lease, the land demised, or any part or parts thereof, may at the option of the Lessor, on behalf of the Territory of Hawaii, or any person or persons, corporation or corporations, be withdrawn from the operation of this lease for homestead or settlement purposes, or for storing, conserving, transporting and conveying water for any purpose, or for reclamation purposes, or for forestry purposes, or for telephone, telegraph, electric power, railway or roadway purposes, or for any purpose, or for sale——"

Mr. Deuel: "Any public purpose."

Mr. Anthony (Continuing): "——any public purpose, or for sale for any purpose for which land may be sold under the provisions of Section 73 of the Hawaiian Organic Act as now or hereafter amended, and possession resumed by the Lessor, in which event the land so withdrawn shall cease to be subject to the terms, covenants and conditions of

this lease, and the rent hereinabove reserved shall be reduced in proportion to the value [8] of the part so withdrawn."

The evidence will show that this land was not withdrawn for any public purpose of the Territory and that the Lessor never, in fact, resumed possession.

The Court: Now, Whitehouse's letter was dated in June, what day?

Mr. Anthony: July 2.

The Court: July 2.

Mr. Anthony: And the cancelation was made effective June 29.

The Court: Four days before.

Mr. Anthony: We would like to offer those three documents in evidence, your Honor.

The Clerk: The General Lease will be Joint Exhibit B-1; the Assignment, B-2; and the letter dated July 2, 1942, B-3.

The Court: Received.

(Thereupon the documents above referred to were received in evidence as Joint Exhibits B-1, B-2, and B-3.)

Mr. Anthony: We next would like to offer in evidence General Lease No. 1741, dated December 29, 1925, between the Commissioner of Public Lands and James F. Woods for a term of twenty-one years. The lease contains the same withdrawal clause that I have just read. I will not repeat that, your Honor. Assignment from James F. Woods

to [9] L. L. McCandless, dated March 21, 1928; and a letter dated July 27, 1942.

The Court: July what?

Mr. Anthony: 27, 1942, from L. M. Whitehouse to the Trustees of the L. L. McCandless Estate, the first two paragraphs of which are substantially the same as the prior letter. The third paragraph reads as follows:

“As rent under this lease has been paid to December 29, 1942, and as there is no provision in law for the refund of any portion of the rent paid for the current six months, General Lease No. 1741 is hereby cancelled, effective December 29, 1942, the date to which rent under this lease has been paid. However, since the army requires this land be immediately available to it, we ask your cooperation in agreeing to sublease from yourselves to the army of this land for the remaining period to December 29, 1942. Such a sublease to the army, we understand, is permissible and you would thereby, in a measure, be refunded for such rent as has been paid to December 29, 1942.

“Very truly yours,

“/s/ L. M. W.

“L. M. WHITEHOUSE,

“Commissioner of  
Public Lands.”

We offer those in evidence, your Honor. [10]

The Court: Received:

The Clerk: Joint Exhibit C-1 is the General

Lease; C-2 is Assignment of the Lease; and C-3 is the Letter.

(Thereupon, the documents above referred to were received in evidence as Joint Exhibits C-1, C-2, and C-3.)

Mr. Deuel: Did I understand your Honor to state that you will not entertain a motion to make a ruling in regard to the sufficiency of paragraph 3 of the Complaint, which has to do with the cancelation of these leases?

The Court: It might be appropriate for you to bring that up now in the form of an objection. I think on second thought that I would prefer to hear the plaintiff's case and then hear that as a defense.

Mr. Anthony: Mr. Marks, will you take the witness stand, please.

### ALFRED LESTER MARKS

called as a witness on behalf of the plaintiff, being first duly sworn, was examined and testified as follows:

The Clerk: Will you sit down, Mr. Marks, please.

### Direct Examination

By Mr. Anthony:

Q. Your full name, please.

A. Alfred Lester Marks.

Q. You were born in Hawaii, Mr. Marks?

A. I was. [11]

Q. And you are one of the trustees of the estate



(Testimony of Alfred Lester Marks.)

of L. L. McCandless, deceased?           A. I am.

Q. At the time of the institution of this proceeding the Bishop Trust Company and yourself were co-trustees; is that correct?

A. I was executor of the estate and the Bishop Trust Company was administrator.

Q. And at the present time the executorship has been closed; is that it?

A. The probate has been closed and the estate is in the hands of the trustees.

Q. The trustees at the present time are who?

A. Mrs. Loy McCandless Marks, Herbert M. Richards, and myself.

Q. And you are the duly appointed, qualified, and acting trustees of the estate of L. L. McCandless, deceased?           A. We are.

Q. And what relation do you bear to L. L. McCandless, deceased?

A. I am his son-in-law.

The Court: Whom else did you say? Did you name four trustees?

The Witness: No, three, Mrs. Marks and Herbert M. Richards. [12]

The Court: I was a little confused about your naming Marks there.

Q. (By Mr. Anthony): Mr. Marks, what is your business? Will you briefly state what businesses you have been in.

A. I am chairman of the board of trustees of this McCandless Estate. I also have some property of my own. I have recently resigned from being



(Testimony of Alfred Lester Marks.)

commissioner of public lands of the Territory and surveyor of the Territory. I have been in the contracting business. I am a civil engineer.

Q. Have you had any experience with ranches?

A. I have been ranch manager for the McCandless ranches ever since Mr. McCandless' death in the latter part of 1940.

Q. Mr. McCandless had certain ranches in the Territory here? A. He did.

Q. Will you describe those briefly.

A. The ranch at Waianae. There is a ranch over at Waiahole and Waikane. There is a small ranch down at Waimalu on this island, and there is a ranch of considerable size in south Kona on the island of Hawaii.

The Court: Where is Waimalu?

The Witness: Waimalu is just on the ewa side of Pearl City near Kalawao. Goes from Pearl Harbor up to the top of the Koolau Mountains. [13]

The Court: How big is that?

The Witness: A little over 2,000 acres, including the forest reserve land in it.

Q. (By Mr. Anthony): And what is the——

The Court: What did you call that section again?

The Witness: Waimalu.

The Court: Yes.

Q. (By Mr. Anthony): Now the ranches in the Waianae District were what, Mr. Marks?

A. The ranches in the Waianae District here originally contained the present Naval Ammunition

(Testimony of Alfred Lester Marks.)

Depot in Lualualei, an area below that area that is now occupied by the wireless communication area, and there was an area in Waianae on both sides of Pahehe Ridge, and also an area up in Waianae Valley that was called Puuanako. It also consisted of an area of land called Ohikilolo and Makua Valley, Kahanahaiki Valley, Keawaula, and Kuaokala. The ranch at present, though, is not anywhere near comprising all of that, because the ranching areas have been of diminishing size for some time.

Q. On December 7, 1941, state what lands were comprised in the McCandless Ranch at the Waianae District.

A. There was an area adjacent to the ammunition depot in Lualualei.

Q. Can you indicate that on the map?

The Court: Lualualei. [14]

A. It doesn't show it. Lualualei is up in here (indicating).

The Court: Why do you put that in with the Waianae, because it is in Waianae District?

The Witness: It is in the Waianae District.

Q. (By Mr. Anthony): Did you operate those lands more or less as a unit, Mr. Marks?

A. More or less. There were separate foremen. The foreman at Makua took care of the area also that was around the ridge and the area that was up in Waianae Valley. And he also had assistants that lived on the place that would act more as watchmen, though, would not make any definite decision.

(Testimony of Alfred Lester Marks.)

Q. Now, coming down to Lease No. 1740, that was a lease from the Territory; is that right?

A. That was a lease from the Territory.

Q. How many acres did that contain, Mr. Marks, approximately?      A. Around——

Q. Have you a memo of it?

A. I don't know. It states on the lease; if I could see the lease, I could answer that. My recollection is that the two together were about 4700 acres.

Q. That is 1740 and 1741?

The Court: What are you looking at now? [15]

The Witness: Referring to Lease 1740.

Q. (By Mr. Anthony): It is in the schedule there?

A. It was 2275 acres, and Lease 1741 was 2517 acres.

Q. Did the McCandless Estate own any land in fee simple in that vicinity?

A. Adjacent to 1740 the lands of Ohikilolo were mostly owned in fee simple and some of the Keaau lands.

Q. What is the approximate area of Ohikilolo?

A. The Ohikilolo and Keaau aggregate about a thousand acres.

Q. What was that land used for?

A. That was also used for cattle.

Q. Directing your attention to this parcel of land at Kaena Point, was that owned by the McCandless Estate?

(Testimony of Alfred Lester Marks.)

A. That was owned in fee. That is part of the land of Keawaula.

Q. Was that used for ranching purposes?

A. That was.

Q. Mr. Marks, were there any improvements on Leases Nos. 1740 and 1741?

A. There were fences, corrals, and on 1740 there was a house that we occupied down there, together with a small guest cottage. There were also water troughs and other such equipment of a cattle ranch.

The Court: This lease '40 would describe [16] that area, excepting what kulianas and other small properties were individually owned, here at Makua, and this '41 as well, would it not?

The Witness: Yes.

The Court: McCandless had acquired title to some of these smaller holdings?

The Witness: To most of the kulianas.

Q. (By Mr. Anthony): Mr. McCandless had title to those?

A. There were only three or four that he did not have title to.

Q. Now, were those lands comprised by Lease 1740 and 1741 fenced, Mr. Marks?

A. They were.

Q. In 1941, December 7?

A. The lease 1740 was fenced and cross-fenced. It was cut into paddocks. 1741 had a wing fence across the top of it and a corral there, and also the boundaries of the area in general, as against the adjacent property, was fenced.

(Testimony of Alfred Lester Marks.)

The Court: Against the forest reserve?

The Witness: Against the forest reserve and against Kealia.

Q. (By Mr. Anthony): Was that Dillingham lease?

A. Dillingham had a Government lease.

Q. The land of Kealia? A. Kealia. [17]

The Court: Was the fence along this boundary, or was it a natural formation?

The Witness: That was a fence along that boundary. At the makai side of the property is a steep precipice and there was no fence along that.

Q. (By Mr. Anthony): When you use the expression "makai" on this map, that is in a westerly direction? A. I think it is due north.

Q. North? A. Due north.

Q. Due north, a line running from approximately Kaena Point——

A. Towards Waialua.

Q. Toward the land of Kealia, as indicated on this map? A. Yes.

The Court: You have a fence between the McCandless lease and his holding here?

The Witness: Yes. That is, in general, a ridge going along there. That is practically inaccessible. The cattle couldn't get over there. And then there is a cave down on the westerly portion, and the fence runs right up to the cave, so that as far as actual ranch management is concerned, the Ohikilolo area was a separate paddock from the Makua area, which is included in 1740. [18]



(Testimony of Alfred Lester Marks.)

Q. (By Mr. Anthony): What was the name——

Mr. Anthony: Withdraw that.

Q. (By Mr. Anthony): What did you have on this ranch on December 7, 1941, what kind of animals and livestock?

A. Cattle, horses, and pigs.

Q. Can you give us an estimate as to the number of animals that were on the ranch?

The Court: What date was that?

Mr. Anthony: December 7, 1941.

Mr. Deuel: Objection. I would like it to be made plain that the witness knows how many animals there were there of his own knowledge.

The Court: That is a subject you can examine him on.

Q. (By Mr. Anthony): You were the manager of that ranch, were you not?

The Court: Why do you take December 7, 1941? What is that date connected with outside of the bombardment?

Mr. Anthony: Well, immediately following the blitz the Army went in and took possession, and the troops were deployed throughout the area, and the fences were cut.

The Court: Before they asked for the land?

Mr. Anthony: Yes, and the cattle were scattered all over the countryside.

The Witness: The area included, in general, Leases 1741 and 1740. We had not had a count of the cattle, but [19] we were—it was carrying as



(Testimony of Alfred Lester Marks.)

many as we could put on it, and we estimated that there were about 1200 head there.

Q. (By Mr. Anthony): Now, after the blitz, Mr. Marks, did you communicate with your foreman, or did he communicate with you?

A. I do not recall whether I rang him up or whether he rang me up.

Q. What was his name? A. Rainy.

Q. Incidentally, he has a broken leg at the present time? A. He is in the hospital at Pahala.

Q. You tried to get him down here?

A. He is no longer employed by us. He is working for Kapapala Ranch, and he is in the hospital at Pahala.

Q. You talked with Rainy; is that right?

A. I did.

Q. And what did you learn from Mr. Rainy? What did he report to you?

Mr. Deuel: If the Court please, whatever Mr. Rainy or someone else may have told him is hearsay and we object to it.

Mr. Anthony: Just the fact of a report.

The Court: Mr. Rainy was his manager. He was the manager or superintendent of that, and what he told his [20] employer as to the number of head of cattle would seem to me to be permissible.

Mr. Anthony: We just want that in evidence, your Honor, for the proof of the fact that the report was made, not as to whether or not what Rainy said is true or false. He is not here for cross-examination, but it is certainly admissible to find out

(Testimony of Alfred Lester Marks.)

what report was made at the time and what he did pursuant to that report. This is just a preliminary question.

Mr. Deuel: I have no objection to his stating whether he got a report from Mr. Rainy or not, but details as to what Mr. Rainy may have told him I contend are hearsay, your Honor.

The Court: Overruled.

Q. (By Mr. Anthony): What did Rainy report to you?

A. Rainy reported that the troops were on the land, and I instructed him to cooperate in every way he could.

Q. And, so far as you know, he did that; is that correct?      A. He did it.

Q. How soon after December 7 did you get down there?

A. I personally didn't get down there for about ten days, as I recall it.

Q. It was a little rough going in those days, was it not?      A. It was. [21]

Q. Well, when you got down there, what did you observe?

A. The troops were occupying most of the available houses. They were busy putting up barbed wire entanglements. They had torn down fences and were using any available material that could be used in the creation of their defensive positions.

Q. You interposed no objection at all to that work?      A. No.

Q. You were glad to see it done?

(Testimony of Alfred Lester Marks.)

A. I was. We offered every assistance that we could be to them.

Q. Now, what did you observe as to the condition of the fences?

A. The fences were down. The wires had been cut. The pipe lines taking water to the troughs had been cut. In two instances that I remember the troughs had been turned over, and in another instance where there was a permanent concrete watering trough a machine gun had been used to shoot the corner off of it. They seemed to think that mosquitoes were breeding in it.

Q. What happened to the paddocks?

A. It was all one paddock. The fences between the paddocks were—the wire was down. In the wire fence you may only cut between one post, but the rest of the fence goes down unless there are intervening anchor posts, which there usually [22] are not. Your fences are anchored at the corners.

Q. Describe the character of this wire fence. How many strands?

A. It was mostly five strand; in some instances, six.

Q. Smooth wire or barbed wire?

A. Smooth wire. They were erecting also a lot of barbed wire barriers all over the place. One didn't like to be too nosey in those days, but just going down there between our house on the beach and the ocean there were six distinct lines of barbed wire, each of them about five feet wide and eight feet high, and there was an expediency of a

(Testimony of Alfred Lester Marks.)

landing down there, and they were taking all material that they could get hold of and every precaution that they could to be prepared for it.

Q. Now, what happened to the cattle?

A. The cattle just were dispersed. Some of them were still around there. Some of them were shot. Others went up into the forest reserve, and the cowboys were out tending to as many of them as they could, but there were troops all over the land. These troops were also up in the mountains shooting, and the ranching activity just was a catch-as-catch-can proposition from there on.

Q. Did you make subsequent trips to the Waianae and Makua lands in these leases?

A. Yes. We were down there approximately every week-end [23] until we were ordered out in 1942, I believe it was, the latter part of '42.

Q. Did you examine the Pahehe Ridge area? Did you get up in there?

A. Yes.

Q. What happened to the fences up there?

A. They were also cut.

Q. The same was true as to Makua?

A. Makua.

Q. How about Kahanahaiki Valley?

A. That also. The same condition prevailed throughout the area.

Q. The entire area covered by these two leases?

A. By these two leases. This Pahehe Ridge, though, is down in Waianae. That is not under these two leases.

(Testimony of Alfred Lester Marks.)

Q. Now, did you give any instructions to your foreman in regard to rounding up cattle?

A. Not at that time.

Q. I mean subsequent to the first visit that you made down there?

A. Not any specific instructions until we got orders to get out. When we got orders to get out, then we rounded up all we could.

Q. Will you describe the character of that task of rounding up these cattle. [24]

A. Well, we drove all that we could. We got as many cowboys as available and went into the Makua, Kahanahaiki, Keawaula area and a couple of times went up on Kuaokala and drove all those that we could surround. But with the lack of fences it was a most difficult task. The first drives that were relatively successful took over, I believe four hundred and some odd cattle, and then after that it became more difficult. We would have to trap and we would have to chase them up the mountains and behind the crags, and it was like a merry-go-round. And those we also rounded up and did the best we could to catch everything we could, until we had to stay out.

Q. Now, you have testified a moment ago that the water troughs and the pipe lines were cut. What effect did that have on the characteristics of the cattle to stay put?

A. That drove the cattle up into the forest reserve.

Q. In other words, they were thirsty?



(Testimony of Alfred Lester Marks.)

A. They were thirsty, and in the forest reserve there were small holes where seepage water would accumulate, and the run-off from the rain. Wasn't as extensive as it was in the open country, and the result of cutting those pipe lines and depriving the cattle of water virtually drove them up onto the forest reserve.

Q. Now, can you give us an estimate of how many cattle were lost as a result of these activities that you have just [25] described on the McCandless Ranch? A. Our estimate is 366 head.

Q. And can you state in what approximate areas those cattle were lost.

A. There were thirty of them were lost down in the area in Waianae around that Pahehe Ridge area. There were eighty of them lost in the Makua area.

The Court: How many? Eighty?

The Witness: Eighty.

A. (Continuing): And about 250 in the Keawaula and Kuaokala area, and in addition to that there were four head killed in Makua and two killed at Waimalu.

Q. How were they killed?

A. Well, two in Makua were shot, two were run into by trucks or tanks, and those in Waimalu were shot.

Q. Did they have trucks down there? Did the Army have trucks down there?

A. Yes, trucks and tanks and all manner of motor vehicles.



(Testimony of Alfred Lester Marks.)

Q. Did they have any gun emplacements in the ridge up in the forest reserve?

A. They had gun emplacements and pill boxes and anti-aircraft locations, and also gun emplacements on the beach, and some mobile artillery at two ends of the Makua Beach.

Q. In other words, the troops were deployed over the [26] entire area?      A. They were.

Q. Did you lose any horses as a result of the taking over of the ranch?

A. There were two saddle horses that were killed. The area adjacent to the railroad track the fence was cut and at night the horses went through the fence and these two saddle horses were killed.

Q. Can you give us the reasonable value of those cattle as of the date they were lost subsequent to December 7, 1941?

A. We valued them at \$100 a head, which included steers, cows, bulls, and the whole works.

Q. How about the two horses?

A. We valued those at \$125 a piece.

Q. Did you have any other animals on this ranch?      A. We had quite a few pigs.

Q. Where were the pigs holding forth?

A. The pigs' headquarters were in Kahanahaiki Valley in the vicinity of Peter Andrews' house. That is one of the ranch houses. But they roamed all over the pasture and went clear up into the forest reserve. They were not fully domesticated, you might say.

(Testimony of Alfred Lester Marks.)

Q. Can you give us some idea of how many pigs there were there?

A. About two hundred. [27]

Q. And what happened to the two hundred?

A. Well, they just were dispersed also. The troops were living on pork and they were giving pigs away to other people. They just disappeared is all. A lot of them were shot.

Q. What is your opinion as to the fair value of those pigs as of the date which they were destroyed?

A. I valued them at \$25, which I think is rather on the under side than on the upper side.

The Court: Irrespective of size?

The Witness: That is correct. In placing a value on these it is necessary to visualize an average pig and put a fair price on it, is the procedure that I followed.

Q. Now, Mr. Marks, did you have any talk with the Military Governor about this business of cutting the fences to see whether anything could be done?

A. I wrote a letter to the Military Governor, because it seemed that there was unnecessary cutting of fences and leaving them open, which would cause the cattle to get onto the highway and in other cases would just disappear and leave. They would be further dispersed. In response to my letter an order was issued relative to the cutting of fences which stated that when fences were cut that they should mend them at night.

Q. Was anything ever done about that [28] order?

(Testimony of Alfred Lester Marks.)

A. I didn't see any effect of it at all.

Q. Did you ever talk to General Green about this? Did you have any conversations with Green?

A. Not personal. I had a letter with him, I believe.

Q. I hand you a letter dated 1 January 1942. Did you receive that from General Green?

A. I did.

Q. That was in response to your letter, which is attached there?

A. That was in response to my letter of December 29, 1941.

Mr. Anthony: We offer them in evidence.

Mr. Deuel: I have no objection to these going in on the understanding that they go in only to show the fact that these statements were made, but I would object to their going in for the purpose of showing the truth of the statements therein.

Mr. Anthony: We decline the restriction, your Honor. We offer them for all purposes. This is an exchange of correspondence, and if they contain any admissions by General Green or anybody else, it is relevant to this case. First is a letter dated December 29, 1941, addressed to the Military Governor by A. Lester Marks, calling attention to the fact that they have been endeavoring to fatten the cattle in compliance with the food conservation program, and the fences [29] having been cut and the cattle allowed to disperse. He requested that attention be called to this, and there is a reply.

(Testimony of Alfred Lester Marks.)

Mr. Deuel: It is common practice, your Honor, as I am sure you know, when a complaint is made to the Military authorities of this kind to make a reply of this kind, and it does not necessarily acknowledge the truth of the complaint. As I say, for the fact that the complaint was made and for the fact that General Green acknowledged it and said that action be taken I will not object, but for the truth of the statement in the complaint I do object.

Mr. Anthony: Here is the witness on the stand who wrote the letter. He is subject to cross-examination. That objection is purely captious, your Honor. Here is the witness who wrote the letter.

The Court: I didn't get it that he was objecting to this letter or the contents of it, but to some admissions by Green, as I understood it.

Mr. Anthony: There is in the next letter, but there isn't in this one here. Green says in his reply:

This matter has been referred to the Commanding General and we hope in the future "it will be possible for all parties to repair or install temporary barriers at any place where it is necessary to cut any fence." That is a perfectly understandable answer. [30]

The Court: Let's see what the rest of it is.

Mr. Anthony: Shall I read the letter, your Honor?

The Court: Yes.

Mr. Anthony: "Dear Sir:" This is to the Military Governor, dated December 29, 1941.

(Testimony of Alfred Lester Marks.)

“The estate of L. L. McCandless has on various parcels of land, located on this island, many herds of beef cattle which, under instructions from the office of the food conservation head, we are endeavoring to fatten for local consumption.

“In a number of instances and particularly in the Waianae areas fences have recently been cut and the cattle allowed to disperse over the countryside. A number of these we have been unable to gather in.

“While we do not desire to make a request that would impede the preparations for national defense and also while assuring you of our desire to continue our cooperation to the fullest extent of our resources, may I suggest an order to field parties that when fences are cut, temporary barriers be installed at night to prevent the cattle from straying onto the highways and becoming lost.

“Thanking you for your consideration of this matter and again assuring you of our desire to cooperate in any way, I remain [31]

“Sincerely,

“/s/ A. LESTER MARKS,

“A. LESTER MARKS,

“Executor, Estate of

“L. L. McCandless.”

The reply is:

“Dear Sir:

“Receipt of your letter of December 29, 1941, relating to destruction of some fences is acknowledged.



(Testimony of Alfred Lester Marks.)

“This matter has been referred to the Commanding General Hawaiian Department with the hope that in the future it will be possible for all parties to repair or install temporary barriers at any place where it is necessary to cut any fence.

“Thanking you very much for calling this matter to our attention, I am

“Sincerely yours,

“/s/ THOMAS H. GREEN,

“THOMAS H. GREEN,

“Colonel, J.A.G.D.,

“Executive.”

The Court: Objection, if it still is made, is overruled.

The Clerk: Libelant's Exhibit A.

(Thereupon, the document above referred to was received in evidence as Plaintiff's Exhibit A.) [32]

Mr. Anthony: We also offer in evidence a letter dated January 15, 1942, from Thomas H. Green, on the stationery of the Office of the Military Governor, Thomas H. Green, Colonel, addressed to the witness, reading as follows:

“Dear Mr. Marks:

“I am directed by the Military Governor to advise you that in accordance with the suggestion contained in your letter of 29 December 1941, an Operations Memorandum relative to the cutting of fences by



(Testimony of Alfred Lester Marks.)

troops, copy of which is attached hereto, has been issued, and to thank you for bringing the matter to his attention.

“Yours very truly,

“THOMAS H. GREEN,”

to which is attached Operations Memorandum Number 12, “Fences Inclosing Pasture Lands.”

“1. In a number of instances, and particularly in the Waianae Area, fences have recently been cut and the cattle allowed to disperse over the countryside. The owners have been unable to round up a number of these.

“2. It is desired that where troops find it necessary to cut fences, temporary barriers be installed to prevent the cattle from straying on the highways and becoming lost.

“By comand of Lieutenant General Emmons:

“J. LAWTON COLLINS, [33]

“Colonel, General Staff Corps,

“Chief of Staff.

“Official: William E. Donegan

“Distribution: ‘C’.”

The Court: I can't admit that letter as an admission. It very clearly impresses me that what it means is that a complaint was made regarding cattle.

Mr. Anthony: That is right. The witness has already testified as to the fact, but what I want

(Testimony of Alfred Lester Marks.)

to bring out is that this order was issued and nothing was done about it.

The Court: Yes.

Mr. Deuel: In this instance, your Honor, the order spoken of here does contain the statement that fences have been cut and cattle dispersed.

Mr. Anthony: There is no dispute about that.

Mr. Deuel: Not as far as the witness is concerned, but I object to it as an admission on the part of the Government.

The Court: Well, I say I can't accept that as an admission on the part of the Government.

Mr. Anthony: I am not offering it as an admission. I am offering it as what the Army did in pursuance to the request.

The Clerk: Plaintiff's Exhibit B.

(Thereupon, the document above referred to was received in evidence as Plaintiff's Exhibit B.) [34]

Q. (By Mr. Anthony): After that order was issued, Mr. Marks, did they do anything about your suggestion? A. No.

Q. Did you call it to their attention down there at Waianae?

A. I visited two of the field headquarters and made complaint to them and pointed out the fact that this order had been issued, and they didn't even know about it.

Q. Did you get any complaints from the Navy

(Testimony of Alfred Lester Marks.)

about your cattle straying down there in the Navy's domain?

A. We did. We got a couple of telephone messages from the Navy that our cattle had strayed upon the area that was the Naval Wireless Station down there, and we dispatched cowboys to round them up, but didn't get any.

Q. Is this an original of a letter you got from the Fourteenth Naval District about straying cattle? A. It is.

Q. And that refers to cattle in the Waianae District that were dispersed by reason of the facts you have testified to? A. It is.

Q. And that is a copy of your reply attached; is that right? A. It is.

Mr. Anthony: The reason we are taking as much time [35] as we are, your Honor, we don't know what the Government's defense is; I didn't know until just a few minutes ago that there was any contention that they hadn't cut these fences; I don't know whether there is or not, or whether there is any contention that the cattle weren't spread over the countryside; that's why I am putting this evidence in.

Mr. Deuel: No objection.

Mr. Anthony: I would like to offer in evidence, your Honor, a letter from the Fourteenth Naval District, Chief of Staff, dated February 8, 1942, addressed to McCandless Estate, and the reply dated February 10, 1942.

The letter from the Fourteenth Naval District reads as follows:

(Testimony of Alfred Lester Marks.)

“Gentlemen:

“A number of cows are reported to be within the fence recently constructed at the Naval Radio Station at Lualualei, Oahu, Territory of Hawaii. According to the best information available to the officer in charge there, the cows are your property.

“If actually the cows belong to you, will you kindly take steps at once to remove same? If not, and you know to whom they belong, will you please advise the Commandant? The cows moving about the station during the night are a constant source of alarm to sentries and there is a strong possibility that they might be killed by one of [36] the Marine Patrols. The Navy Department assumes no liability for injuries to or killing of livestock trespassing on Navy property.

“Very truly yours,

“J. B. EARLE.”

And the reply is as follows:

“We beg to acknowledge receipt of your letter under date of February 8th relative to cattle on the premises of the Naval Radio Station at Lualualei.

“We thank you very much for calling this to our attention. These cattle were in pasture in Waianae Valley and we have not been able to locate them since the fences were cut and left open by the Army last December.

“I am ordering our ranch manager to immedi-

(Testimony of Alfred Lester Marks.)

ately communicate with the Radio Station Commandant relative to access to the reservation to round them up.

“Again thanking you, I remain,

“Very truly yours,

“A. LESTER MARKS.”

Q. (By Mr. Anthony): Did you get those cattle? A. No.

Mr. Anthony: We offer that letter in evidence, your Honor.

The Court: Received. [37]

The Clerk: Plaintiff's Exhibit C.

(Thereupon, the document above referred to was received in evidence as Plaintiff's Exhibit C.)

Q. (By Mr. Anthony): How was it you didn't get them?

A. The cowboys went over there two or three times to round them up and couldn't find them.

Q. Did you know an Army officer by the name of Charles S. Marek?

A. I did. He was a colonel and was the Army real estate officer.

Q. He was in the Engineers, was he not, had charge of acquisitions of real estate?

A. He was.

Q. On behalf of the Army?

A. He was. Office on Punahou School grounds.

Q. Did you have any conferences with him in



(Testimony of Alfred Lester Marks.)

regard to the occupation by the Army of the McCandless ranches?      A. I did.

Q. Incidentally, after they went into possession, did the army ever get out of possession of this area?      A. They have not.

Q. It was never returned to you at any time?

A. It was not.

Q. In other words, they were continuously in possession from and after December 9, or whenever they went in there, 1941? [38]

A. 1942, I believe.

Q. 1942, I mean.

A. Well, we were ordered out in 1942. They came in just after the blitz, and we got along as best we could until we were officially ordered out.

Q. In other words, you were in there with the Army from the time of the blitz on until the time you were ordered out; is that right?

A. That is correct.

Q. And you were trying to do the best you could there?      A. Yes.

Q. Did you have any conferences with Marek in regard to how they were going to handle this proposition?

A. I had a number of conferences with Colonel Marek, and he favored the Army taking a lease of the area, and that was seriously considered at one time. They were going to take a sub-lease from us, and they were also going to take the cattle, even if they had to shoot them, as they expressed it.



(Testimony of Alfred Lester Marks.)

They wanted that area. And I went out and went into the proposition with a civilian employee of the Army Real Estate by the name of Jackson.

The Court: Well, there are two distinct areas there represented by those two leases. Which area did they want?

The Witness: They wanted both of them. [39] They wanted both of those areas, plus our fee simple land in there, but excluding the area at Kaena Point.

Q. (By Mr. Anthony): Well, I gather that those negotiations "blew up" or "petered out"; is that right?

A. The school of thought that wanted to acquire title and wanted to keep it as a permanent installation even after the war apparently won out, because that is the pattern that has been followed even to the extent of condemnation of fee simple holdings within the leasehold.

Q. Incidentally, the fee simple lands you are referring to have in fact been condemned by the United States? A. They have.

Q. That is, the land that was owned by the L. L. McCandless Estate in that area was condemned in Civil No. 485; is that right?

A. That is correct.

The Court: Was any order ever made by the Governor setting over the Government's land there to the Army and Navy?

The Witness: It was immediately made, immediately upon the cancellation of our leaseholds.

(Testimony of Alfred Lester Marks.)

The Court: All right.

The Witness: A revocable permit, as I recall it, was issued.

The Court: You speak of being ordered out. You [40] construe the letters of Whitehouse to be your order to get out?

The Witness: Yes, we were told to make it available for their exclusive use in one of the communications.

The Court: Those letters that you referred to?

The Witness: Yes.

The Court: The Army itself didn't order you off? /

The Witness: They came down and moved us.

Mr. Anthony: That is the letter I have right here, your Honor.

The Court: All right.

Mr. Anthony: At this time we offer in evidence a letter dated June 11, 1942, from Charles S. Marek, Major, Corps of Engineers, Real Estate Officer, addressed to Bishop Trust Company, Limited. The date of it is June 11, 1942.

"Gentlemen:

"This is to confirm decision made by the Department Commander that the entire Makua and Kahanahaiki Valleys, excepting railroad and road rights-of-way paralleling shore line, be acquired by purchase.

"Since the utilization of these valleys is urgently needed for training purposes, it is desired that cat-

(Testimony of Alfred Lester Marks.)

tle located in the area be rounded up and moved to another locality as soon as practicable. [41]

“Negotiations for this acquisition will be initiated by this office, together with the negotiations for leasing Mokuleia and Kuaokala Forest Reserves, Kuaokala and Keawaula Land Sections. Removal of cattle from the land other than Makua and Kahanahiki may be accomplished at a later date.

“The Army has no objection to removal of the present dwellings to other locality if such action is desired by the present owner.

“In this connection, it is requested that the Army be permitted to fully occupy for military purposes, the Makua and Kahanahaiki Valleys, not later than June 20, 1942.

“Very truly yours,

“CHARLES S. MAREK.”

The Court: Well, those two valleys, don't they generally refer to both of those as Makua?

The Witness: The district is called Makua District, perhaps erroneously, but that is the accepted terminology.

The Court: All right.

Q. (By Mr. Anthony): Well, in accordance with the request, did the Army have exclusive occupation on the date that they asked, June 20, 1942?

A. I think it took us a little longer than that [42] to get out of there, but we were, you might say, tolerated for a short period after that, but we made every effort to get out on that time.

(Testimony of Alfred Lester Marks.)

Mr. Anthony: We offer that letter in evidence, your Honor.

The Court: Exhibit——

The Clerk: Plaintiff's Exhibit D.

(Thereupon, the document above referred to was received in evidence as Plaintiff's Exhibit D.)

The Witness: In that connection, if I might elaborate a point, there were certain installations on our fee simple land that the Army were replacing over in Ohikilolo right next door, and we couldn't move over until those replacements, of house particularly, were installed, so the period would run beyond the date mentioned in that communication.

Q. (By Mr. Anthony): Incidentally, how many men did you have down there, approximately?

A. There were five or six regular employees and a number of casual employees who lived in the district and would get casual employment.

Mr. Anthony: At this time, if your Honor please, we offer in evidence two letters each dated June 17, 1942, one from Delos C. Emmons, Lieutenant General, to the Governor, Joseph B. Poindexter, and the other from Delos C. Emmons [43] to Charles M. Hite, Acting Governor, the first of which reads as follows:

"My dear Governor Poindexter:

"Reference is made to your letter of 29 November 1941, wherein you advise that the lands within Makua and Kahanahaiki Valleys, this Island, will be available to the War Department.

(Testimony of Alfred Lester Marks.)

“In this connection, please be advised that it is of vital importance to the War effort that these lands be made available immediately. It is therefore requested that General Lease No. 1740 to L. L. McCandless be withdrawn, and that these areas be turned over to the exclusive use and jurisdiction of the War Department.

“Attached for your information is copy of letter addressed to the Bishop Trust Company, Limited, on this subject.”

The other letter is addressed to Mr. Hite, same date.

“This is to acknowledge letter from the Commissioner of Public Lands——”

This is a memorandum, your Honor.

“This is to acknowledge letter from the Commissioner of Public Lands, dated July 2, 1942, and indorsement thereon by Governor Poindexter, informing this Headquarters that General Lease No. 1740, covering Government land in Makua has been cancelled, permitting the War [44] Department——”

The Court: How come you say these letters were dated June?

Mr. Anthony: July. Oh, I am confusing your Honor. I did say June. I am mistaken. The first one I read was June 17, 1942.

The Court: Yes.

Mr. Anthony: And the second one is July 17, 1942.

The Court: Yes.

Mr. Anthony: I guess in the meantime Governor Poindexter had gone to Washington.



(Testimony of Alfred Lester Marks.)

“This is to acknowledge letter from the Commissioner of Public Lands, dated July 2, 1942, and indorsement thereon by Governor Poindexter, informing this Headquarters that General Lease No. 1740, covering Government land in Makua has been cancelled, permitting the War Department to utilize this property for training purposes.

“Since it is desired to use this area largely for firing of large caliber guns, it is felt that from the standpoint of safety, utilization of upper lands covered by General Lease No. 1741, may be affected. For this reason, it is requested that General Lease No. 1741 be cancelled and control of these lands be temporarily turned over to the control of the War Department for the duration of the existing war. [45]

“Very sincerely yours,

“DELOS C. EMMONS.”

We offer these two letters in evidence, your Honor.

The Court: Exhibit G.

The Clerk: E.

The Court: E?

The Clerk: Yes.

(Thereupon, the documents above referred to were received in evidence as Plaintiff's Exhibit E.)

The Court: I don't see where there is any relation between Lease 1741 and 1740 for using that for range purposes. It is not combined in any way. The



(Testimony of Alfred Lester Marks.)

letter of Emmons to Hite says they want to use this Makua Valley here for range purposes and that injury might be done to property on the forest reserve behind. I don't follow that.

The Witness: The area under Lease 1741 had numerous military emplacements upon it, installations.

The Court: Yes. I was thinking only of this letter where in order to justify the taking over of 1741 he says it is behind or above Lease 1740 in Makua Valley there and that property on it might be injured.

The Witness: I agree with you, your Honor, but we were not questioning any of the military motives at the time.

Mr. Anthony: May I ask how your Honor is going to [46] handle this trial this afternoon.

The Court: Suppose we adjourn now for luncheon, and what time do you want to come back?

Mr. Anthony: Whatever your Honor says. It is entirely convenient to me at any time.

The Court: I guess we can get started at half past one.

Mr. Anthony: Very well, your Honor.

(Thereupon, at 11:35 a recess was taken until 1:30 of the same day.)

#### Afternoon Session 1:35 P.M.

Mr. Deuel: Before we proceed, your Honor, I have a witness, Colonel Fielder, who is here in the

Army but is on orders to make a trip to Washington on Thursday morning at the latest, and by agreement with Mr. Anthony and if it is agreeable with your Honor, I would like to call him at ten o'clock tomorrow morning whether it happens to be out of turn or not.

The Court: All right.

### ALFRED LESTER MARKS

resumed the stand and testified further as follows: [47]

#### Direct Examination

(Continued)

By Mr. Anthony:

Q. Mr. Marks, you have had considerable experience, have you not, in establishing the rental value of real estate? A. I have.

Q. Both in your capacity as Commissioner of Public Lands and as the representative of an owner of lands in this Territory? A. I have.

Q. Do you have an opinion as to the fair and reasonable rental value of the land comprised by Leases 1740 and 1741? A. I have.

Q. As of the date on which your lease was canceled? A. I have.

Q. What, in your opinion, was the fair rental value of that land comprised in those two leases as as of that date?

Mr. Deuel: Objections, your Honor. I wish at this time to interpose an objection to the taking of evidence, of testimony regarding the valuation of these leases on the following grounds: (1) that

(Testimony of Alfred Lester Marks.)

there is no cause of action stated against the United States in so far as the use of the land is concerned, (2) that there is no cause of action allowable by the Enabling Act or the Private Law under which this action is brought for use and occupancy, (3) that the leases in question were in fact validly canceled, and (4) [48] that there is no compensable interest as against the United States for the taking of this property.

The Court: The last one was what?

Mr. Deuel: No compensable interest in the McCandless Estate for the taking and use of this land.

The Court: No compensable interest in the McCandless Estate?

Mr. Deuel: That's right, your Honor.

The Court: I suppose you could elaborate that with argument or reason. This last proposition standing alone doesn't impress me as meaning much. What do you mean? No compensable interest in the McCandless Estate for the taking—well, it wasn't taking in accordance with the provisions for taking and it would sound more like a trespass. What do you mean, no compensable interest?

Mr. Deuel: What I mean by this, your Honor, is that it is my interpretation that under the provisions of the Organic Act, particularly Section 91—First of all, as your Honor knows, the Public Lands of the Territory at the time of annexation were ceded in fee to the United States.

The Court: Yes, I know that.

Mr. Deuel: Thereafter, by Section 91 of the

(Testimony of Alfred Lester Marks.)

Organic Act the use, management and control of these lands were placed in the Territory, but the fee title remained in the United States, and that use, management, and control in the Territory [49] were until such time as the President or Governor or Congress should re-take the use of it for the United States.

The Court: The Territory was given the right to make contracts of leases and, in some instances, sale.

Mr. Deuel: That is correct.

The Court: Those contracts must mean something. They must have some compensable value at least in accordance with the terms of the contract.

Mr. Deuel: I am speaking as against the United States, not against a third party. My contention is that under the Organic Act the United States was at all times in a position to re-take this land without payment of compensation.

The Court: The Territory was the representative. It acted as an agent, manager. I don't follow your statement that there was no compensatory value if they were violated even though the United States is the fee holder.

Mr. Deuel: On that, your Honor, my contention is that pursuant to Section 91 of the Organic Act the Federal Government at any time, by its action, can re-take this land, that a lessee from the Territory has only an interest, in so far as the United States is concerned, compensable to that of a licensee subject to termination at any time.



(Testimony of Alfred Lester Marks.)

The Court: A licensee has some rights. Well, go ahead with your argument. [50]

Mr. Anthony: That is the ultimate issue in this phase of the case, which I thought we were going to argue when we completed the proof, but I am prepared to argue it right now.

The Court: The objection is overruled for the time being.

A. The rental of \$1,125 a month, a thousand a month being the pasture area in general and the \$125 a month being the rental that I placed upon the house and guest cottage.

Q. (By Mr. Anthony): At what rate is that per acre, Mr. Marks?

A. That works out around \$2.50 an acre.

Q. Per annum? A. Per annum.

Q. How does that compare with leases of similar land in the vicinity?

A. That is cheaper than similar land sold at public auction and in private negotiation about that time.

Q. Ranch land?

A. Ranch land, pasture land.

Q. At what price were those areas sold?

Mr. Deuel: Objection. I think we should have the dates of this, your Honor.

Q. (By Mr. Anthony): Will you give us the date. Will you give us the approximate date. [51]

Mr. Deuel: Those should not come in if they are later than the date of this action.

A. I don't have them immediately available.

(Testimony of Alfred Lester Marks.)

The Court: Well, do you have any lands in view?

The Witness: Yes, there was a land in Waianae was at public auction sold. It was after this. It went about \$3.50 an acre.

The Court: How big a tract?

Mr. Deuel: Your Honor, I move that that be stricken. He said this sale was a later date. At least, I understood him to so say, and a sale at a later date would not be permissible for purposes of comparison.

The Court: How much later?

The Witness: About a year.

The Court: That may be stricken.

Q. (By Mr. Anthony): Well, in your opinion the figure of \$2.50 per acre per annum is a fair and reasonable valuation as of the date this lease was canceled; is that right?      A. It is.

Q. Describe briefly those two houses, or the house and the guest cottage. How many rooms?

A. The guest cottage had three bedrooms and a small kitchen and a bathroom. The house had a living room, four bedrooms, and a kitchen, and the house was up quite high off the ground, and it had a cellar that had a concrete floor [52] and head room, and there were servants' quarters down there.

Q. Did it have a water system?

A. Water system, gas.

Q. Electric lights?      A. Gas lights.

The Court: Rock gas?

The Witness: Rock gas.



(Testimony of Alfred Lester Marks.)

The Court: And the water system was rain water?

The Witness: No, the water came from a kuliana up in the valley. The kuliana, belonging to Mr. McCandless, had a spring on it, and water was piped right down to the house, and there was also a shallow well adjacent to the house that was occasionally used.

Q. (By Mr. Anthony): Mr. Marks, to recapitulate, you estimated that by reason of the deployment of the troops and the action of the Armed Forces subsequent to December 7, 1941, you lost 366 head of cattle; is that correct?

A. That is correct.

Q. And you computed that at \$100 a head?

A. I did.

Q. Making a total of \$36,600; is that right?

A. That is correct.

Q. Now you have estimated that you lost 200 pigs and you put a price on those of \$25.

A. I did. [53]

Q. That makes a total of \$5,000; is that right?

A. That is correct.

The Court: How much did you say the cattle were?

The Witness: One hundred dollars a head.

The Court: Yes, but the aggregate would be?

Mr. Anthony: \$36,600.

The Court: Yes. And the pigs, you say?

The Witness: Five thousand dollars.

Q. (By Mr. Anthony): Now, was the McCandless

(Testimony of Alfred Lester Marks.)

Estate put to any expense in rounding up the cattle that had been dispersed over the countryside by reason of the Army activities that you have testified to?

A. We were.

Q. How long a period did that cover, that rounding-up process?

A. We were at it from the time of the blitz until we were completely moved out, and, in fact, we did some rounding up occasionally after the date upon which we were informed to make the land available for the use of the Army.

Q. And do you have any estimate as to what the cost of rounding up your cattle—you did round up some cattle, did you not?

A. We did.

Q. Approximately how many?

A. Almost 700, as I recall, 600 and some, 690—697 is [54] the figure—I will check it, however—it occurs to me—I would like to check it, however. Six hundred ninety-three.

Q. How much did it cost to round those up?

A. The 425 that were immediately available in Makua Valley there I estimate cost us \$2 a head. There were 229 of them that were over at Keawaula and the upper ridges of Makua, I estimated cost \$10 a head; and there were 39 that were caught up on Kuaokala there and were virtually dragged down by their heels. And I estimated those at \$25 a head.

Q. And on that basis, what is your total estimated cost of rounding up these 693 cattle?

A. \$4,115.

(Testimony of Alfred Lester Marks.)

Q. You mentioned two horses that were killed. What was the fair and reasonable value of those horses? A. \$125 apiece.

Q. Or \$250 for the two of them. Did you have any redwood posts there on the ranch?

A. We did.

Q. What were they used for?

A. Those were fence posts.

Q. Unused? A. They were unused.

Q. That is an imported item, is it not?

A. That is an imported item.

Q. And how many did you have there? [55]

A. We had about 200 of them in the yard at my house there, and when the Army moved in, they set up the kitchen, which was a field kitchen, right in my front yard, and they used those redwood posts for firewood.

Q. And what is the fair and reasonable value of those posts, those 200? A. \$80.

The Court: They used mighty poor firewood.

Q. (By Mr. Anthony): Did you have any algaroba beans there, Mr. Marks? A. We did.

Q. What are they used for, incidentally?

A. They are picked up in the fall and stored and used as cattle feed.

Q. They fatten cattle, do they not, in this country? A. They fatten cattle.

Q. How many bags did you have there, approximately? A. We had 400 bags.

Q. And what was the fair and reasonable value

(Testimony of Alfred Lester Marks.)

of those 400 bags of algaroba beans? A. \$60.

The Court: \$60 for the 400 bags?

The Witness: For the 400 bags.

Q. (By Mr. Anthony): The total of the items of livestock and the personal property that you have just testified to, [56] in the aggregate, plus the cost of rounding up the cattle is, \$46,155; is that correct?

A. That is correct. The item of 500 jute bags is also in there.

Q. What is that?

A. Those were empty bags that we filled with beans. They had not yet been filled. These bags were taken and filled with sand and made into sand bag emplacements.

Q. These jute bags are a part of the ranch's equipment, are they not?

A. They are part of the ranch's equipment.

Q. At what price did you put those, Mr. Marks?

A. I put them at 10 cents apiece, or \$50 for those.

Q. Now, you have testified that the fair market value of the land comprised in the two Government leases was \$1,125, or what was that \$1,125?

A. Per month.

Q. Per month? A. That is correct.

Q. And how many months did the lease have to run? A. The lease had sixty months to run.

Q. And what, then, is your valuation of the leasehold value as of the date——

A. \$67,500.

Q. Sixty-seven—— [57]

(Testimony of Alfred Lester Marks.)

A. Sixty-seven thousand five hundred.

Q. That is as of the date the lease was canceled and you were excluded from possession completely; is that right?

A. That is my recollection of the figures. That is five years ago and I would have to check the dates. But in computing our losses we figured that we had been deprived of it for five years, which is sixty months.

The Court: Both leases expired the same time?

Mr. Anthony: Yes, your Honor.

The Court: July?

Mr. Anthony: December 29, 1925. They are for a term of twenty-one years, I think.

The Court: 1740 evidently expired June 29.

Mr. Deuel: Your Honor, they are correct in their statement. The expiration date, according to the lease, had it never been canceled—both leases would have been the 29th of December, 1946. The cancellation dates that we are talking about were two different dates.

The Court: Yes. So you figure it then from December 29, 1941, to get your five years, December 29, 1941?

The Witness: It included 1942, 1943, 1944, 1945 and 1946 up to December 29.

Q. (By Mr. Anthony): Mr. Marks, you had substantial improvements on these two leases, did you not? A. We did. [58]

Q. You have not made any claim in this pro-



(Testimony of Alfred Lester Marks.)

ceeding for the value of those improvements, have you?

A. Not in this proceeding, except on—no, not in this proceeding. I was going to say, except on our fee simple land, but that is the subject of another action.

Q. The reason being your position is that the leases were improperly canceled and that the improvements would revert to the lessor at the end of the term; is that right? A. That is correct.

Q. You previously presented your claim before a committee of the House of Representatives, did you not? A. I did.

Q. At that time you didn't know whether or not the leases were going to be—Were you definite that the leases were going to be canceled at that time?

A. At that time the leases had been canceled and the claim before the House of Representatives was substantially what I have recited.

Q. I see. You also presented a claim to the Army, did you not? A. To who?

Q. To the Army. A. I did.

Q. That was prior to the claim submitted to the House of Representatives Subcommittee on Claims? [59] A. It was.

Q. And what response did you get from the Army as to your claim?

A. They referred me to a Military Board and I appeared before them and told them the various items of damage, which included damage to our property that we owned in fee simple and also in-

(Testimony of Alfred Lester Marks.)

cluded items that would tend to restore the facilities that they had destroyed, and I didn't get—I finally got a reply, as I recall it, in which they told me that we had already been compensated for everything that we were entitled to, and I wrote back, inasmuch as we had not received, and I asked them where we had been compensated, and then they wrote back offering us \$190. But that claim differs from this in the manner that I have indicated.

Q. Is this the letter that you got from the Army telling you that they would pay you \$190?

A. It is.

Q. And enclosed a full release for you to sign?

A. Yes.

Mr. Anthony: We offer the letter in evidence, your Honor.

The Court: All right. Received in evidence.

The Clerk: Plaintiff's Exhibit F.

(Thereupon, the document above referred to was received in evidence as Plaintiff's Exhibit F.) [60]

The Court: Have you told the full substance of the letter?

Mr. Anthony: May I have it please. (Handed to Counsel.) The meat of the letter is:

“You were informed by letter of 7 January 1945 that a check of the records of this office failed to reveal information on which to base adequate reply to your inquiries. Accordingly a request was submitted to the Judge Advocate General, Army Service

(Testimony of Alfred Lester Marks.)

Forces, Washington, D. C., for more complete information.

“This office has received a copy of letter to you from the office of the Judge Advocate General setting forth the reasons for denying your claim except as to certain damages in the amount of \$190.00, which it is hoped satisfactorily answers your questions.

“Very truly yours,

“CARL E. RANTZOW,

“Lt. Colonel.”

You may cross-examine.

Oh, I have one other question.

Q. (By Mr. Anthony): Mr. Marks, you offered to pay the rent, the trustees offered to pay the rent to the Territory under this lease, did they not?

A. They did.

Q. And a tender of the rent was refused? [61]

A. It was.

Mr. Anthony: No further questions.

### Cross-Examination

By Mr. Deuel:

Q. Mr. Marks, you have testified regarding the valuations of your cattle on the ranch area. That presupposes, undoubtedly, that you have a knowledge regarding those cattle; is that correct?

A. General knowledge, yes.

Q. Do you know the condition of the cattle and type of cattle, and so forth?           A. Yes.

(Testimony of Alfred Lester Marks.)

Q. You have to have that to formulate your opinion of value. Will you please describe for us the type of cattle you had down there.

A. How much of a description do you want? They were——

Q. Well, the cattle that you had down there generally are referred to as scrub type cattle, are they not?

A. Not all of them. I would say that a good proportion of them were. There were some blooded whole Herefords. There were some blooded Angus. Mr. McCandless at various times had brought in good stock, but the majority of them were, I believe, what would be classed as scrub cattle, cross breeds.

Q. And you are speaking now of the area of which we [62] are speaking now? A. Yes.

Q. Generally speaking, the Makua and Kuaokala area up above? A. Yes.

Q. You are aware, are you not, and isn't it correct, that there was a considerable percentage of tuberculosis in the herd? A. No.

Q. You don't know that? A. No.

Q. What do you have to say regarding tuberculosis in the herd?

A. There was some, but I wouldn't say considerable.

Q. Would you say 15 or 20 per cent was too high? A. I think it would be.

Q. As manager of the ranch, which you say you were, are you not aware of the records that were

(Testimony of Alfred Lester Marks.)

kept and tests that were made at the time of marketing some of the cattle?

A. They examine them whenever they market them and they are rejected; those that are tubercular are sold for dog food, but the figure that I have given there represents my estimate of the value of those cattle in the condition that they were at the time.

Q. I understand that, Mr. Marks, but I am trying to [63] establish for the Court the actual condition of the cattle, so the Court can make up his mind ultimately as to the value of the cattle. Did you or did you not keep records of the results of these tests for tuberculosis?

A. No, we did not keep record.

Q. If I told you that the Territorial veterinarian, the Board of Agriculture and Forestry, tested the McCandless cattle from March, 1941, right through to a later test April 27, 1942, six different groups of cattle, totaling 284 head, and that there were found to be forty-six infected, would you say that was correct or not?

A. I have no reason to doubt it. I don't recall them doing that at the time, however.

Q. But you don't actually know how many were infected or not?

A. No. We were in the process at the time of cross-fencing Makua Valley, and as we cross-fenced them, why we would have them tested and confined to certain paddocks.

Q. Now, with regard to the fences that you had



(Testimony of Alfred Lester Marks.)

on the properties, I believe you testified, did you not, that the fences were all in good condition, that is, in stock proof condition?

A. Which fences do you have reference to?

Q. I should have said the fences between, first of all, the upper side of the Makua area, that is, the fence [64] between your Makua ranch and the forest reserve up there.

A. Those fences were in good condition.

Q. You are not aware of the fact that many cattle had been getting through there prior to the war?

A. Not at the time. Those fences had been repaired prior to the blitz and the fences in Makua Valley were in good condition.

The Court: The fences surrounding the forest reserve, were they your fences? Did you have to maintain them, or did the Forest or Agricultural Board keep up their forest reserve?

The Witness: My recollection of the terms of the lease was that we had to do that.

Q. (By Mr. Deuel): Mr. Marks——

Mr. Deuel: The provisions in the lease itself, your Honor, require the lessee to maintain fences along the borders of the forest reserve in both instances.

Q. (By Mr. Deuel): This is going back some time, Mr. Marks, but here is a letter dated the 21st of July, 1936, addressed to you. I would like you to identify that.           A. Yes.

Mr. Anthony: What was it dated.

(Testimony of Alfred Lester Marks.)

The Witness: '36.

Mr. Deuel: That is the 21st day of July, 1936, a letter from the Commissioner of Public Lands, then L. M. [65] Whitehouse, to Mr. Marks.

Mr. Anthony: I object to the letter on the ground it is immaterial, something that happened in 1936, no validity or relevance to anything that happened in 1941.

The Court: I can't tell from anything that has been said so far.

The Witness: It has to do with fences.

Mr. Deuel: I am going to explain that, your Honor. This letter I am introducing for the purpose of showing the history of this matter, and I am going to introduce further evidence with my witnesses which will tie in right with it. This letter is to show that as far back as '36 that these fences along the border between the forest reserves and the lease area, this particular one refers to Lease 1740, which is the Makua area, had been in disrepair and were not stock proof; and it is for that purpose that I offer this in evidence.

Mr. Anthony: It is too remote, your Honor. I have a letter right here from the Board of Forestry and Agriculture. It says they inspected them in March, 1941, and found them in good repair.

Mr. Deuel: I will put on the witness from the Board of Agriculture and Forestry in that regard.

Mr. Anthony: Why would a 1936 inspection have any relevance as to how the fences were in 1941? [66]

(Testimony of Alfred Lester Marks.)

Mr. Deuel: It is my purpose to show that this condition had existed for a great number of years and to show negligence.

Mr. Anthony: That is not relevant.

The Court: I can't quite see, if they were brought into good repair and were in good repair at the time the Army entered, what the past record would have to do with it. It would be of no importance.

Mr. Deuel: May I have an exception to the ruling, your Honor.

The Court: Have you anything that shows what the condition was at or approximately near the time?

Mr. Deuel: I will by my direct evidence, your Honor.

The Court: All right.

Mr. Deuel: This will have the same ruling, no doubt, but here is a letter from Commissioner of Public Lands to Mr. McCandless, Attention Mr. Marks, dated June 24, 1936, at the same time.

The Witness: Yes.

Mr. Deuel: You identify that?

The Witness: Yes.

Mr. Deuel: I also offer this in evidence for the same purpose, your Honor.

The Court: Well, if it is of the same nature——[67]

Mr. Deuel: Same nature.

The Court: It is refused.

Mr. Deuel: May I have an exception to that.

The Court: On account of the date. It would be fourteen or fifteen years before.

(Testimony of Alfred Lester Marks.)

Q. (By Mr. Deuel): Going further with regard to the fences, in the lease area 1741, which is the one we refer to as Kuaokala, there is adjoining it the Kuaokala Forest Reserve. Is it not true, Mr. Marks, that at no time was there a fence along the boundary between the lease area and the Forest Reserve?

A. The fence between the leased area and the Kuaokala Forest Reserve, which terminates at the Mokuleia Forest Reserve, which is approximately where my hand is now, was not fenced.

Q. Just for clarification——

The Court: You mean——

The Witness: From here over (indicating) this area here was not fenced. This area (indicating) was fenced.

Q. (By Mr. Deuel): Then it was possible for the cattle that the McCandless Estate had in the Kuaokala area to also wander into the Kuaokala Forest Reserve area?      A. That is correct.

Q. May I ask you whether you know, regarding the fence along, this would be the easterly end of the Kuaokala Forest Reserve, between that there and the Mokullia Forest Reserve, [68] do you know whose fence that was?

A. That fence was put in by the CCC people, I believe.

Q. Would you say it was incorrect if I told you that was a Territory fence?

A. That would be Territory. CCC had a camp up here. That was a Territorial activity conducted



(Testimony of Alfred Lester Marks.)

under the auspices, I believe, of the Board of Forestry and Agriculture.

Q. And you have stated there was a fence in existence between Kuaokala lease area 1741 and the property that Dillingham had, Kealia; is that correct?      A. Yes.

Q. Do you know who put that fence in?

A. We had a gang working up there on that. It was a reconstruction job. There has always been——

Q. Do you deny that that fence was put in by Mr. Dillingham or his people?

A. If it was, it was a joint—I believe he put so many men on it and we put so many men on it. There is a joint fence and neither he nor we could be expected to do the whole thing.

Q. Mr. Marks, with regard to cattle that you had in the Kuaokala area, you had been operating a cattle ranch there for some years; is that correct?

A. That's correct.

Q. Disregarding the time after the war, in what manner [69] would you bring cattle down from there when you were taking them to market?

A. We would have—we would drive and catch them in a fence, in a corral there, then we would just have to drag them down. Occasionally we would take them across the Dillingham property, and occasionally down a trail that goes down almost on the boundary of Kealia and Kuaokala boundary.

Q. That operation of getting those cattle down from there was a rather expensive operation, was it not?      A. Yes, it was.



(Testimony of Alfred Lester Marks.)

Q. And I believe you had quite a number of cattle up there, at least as many or more than you had in Makua?

A. I think less than in Makua. There were quite a few cattle up there, though.

Q. Fairly even, would you say?

A. Makua, the vegetation in Makua could support more cattle than Kuaokala could.

Q. Now, you stated that you never had made, or at least any time around this period, an actual cattle count; is that correct?

A. That is correct.

Q. You made the estimate of your numbers?

A. Yes.

Q. And I believe you stated a little while ago that your estimate would be 1200 head? [70]

A. As I recall, that was our estimate.

Q. You will recall testifying before the Congressional Claims Committee in 1945, do you not?

A. I do.

Q. If I told you that at that time you also stated that you had made an estimate and that your estimate was around a thousand head, do you recall that?

A. I wouldn't say that I didn't. As I recall, this 1200 head, wasn't it, that my testimony was the carrying capacity of it.

Q. That is what I want to clarify. In the Congressional Claims Committee hearing you testified you estimated around a thousand head and today I understood you to say 1200. It certainly couldn't have jumped two hundred at that time.

(Testimony of Alfred Lester Marks.)

A. In an estimate I think it could. My recollection is that I said the carrying capacity was around 1200, or was 1200, and I still think that a thousand head would represent the area of Makua, Kahana-haiki, and Kuaokala and Keawaula.

Q. Then you want the Court to consider your estimate as around a thousand?

A. For that area, yes.'

Q. And that is what this claim is based on?

A. I beg your pardon?

Q. Within the areas in which this claim is based? A. Yes. [71]

Q. That being merely an estimate, though, Mr. Marks, it is possible that it might vary somewhat one way or the other, is it not? A. I think so.

Q. It could be that you didn't have more than 900 head there?

A. No. No, I can't go that far with you. If I made a mistake, it was in the other direction; I have underestimated it.

Q. You did state that you had not made a complete count of the cattle, these cattle also, as you said, were free to range in the Kuaokala Forest Reserve; there were a number of cattle in that area, were there not?

A. You mean in that little—yes, in the unfenced portion of it.

Q. That is right.

A. Yes, there were some in there.

Q. So it is possible that you might have missed your estimate by quite a few?

(Testimony of Alfred Lester Marks.)

A. I think if I did I underestimated, though. I was rather careful to keep on the conservative side.

Q. You testified, Mr. Marks, on one or two occasions when you went up there after the war had broken out, that you saw a number of fences which had been cut.

A. Yes. [72]

Q. Were you there at any time, did you actually see any fences being cut, or was it a matter of seeing fences which you assumed had been cut?

A. I didn't see them actually cutting any fences.

Q. From your own knowledge you don't actually know whether the fences were cut or who cut them?

A. There were roads that the Military vehicles were using going hither and yon and we had no vehicles down there. The place was closed, practically, to outsiders, and the talks that I had with the people down there admitted that it was necessary to do so, and we couldn't argue against it.

Q. Now, with regard to the water supply, you testified that some of the water pipes had been cut and that one or two of the tanks either had been partially destroyed or turned over, or damage done to them. I gathered from that that you implied that the cattle were deprived of water supply.

A. That's right.

Q. Did you actually at any time see the troops depriving the cattle of the water supply?

A. Yes.

Q. Keeping them from it?

A. Yes.

Q. In what nature?

(Testimony of Alfred Lester Marks.)

A. Up on Kuaokala we had a water trough with a pipe running from a spring, and they actually cut this water trough [73] off and put their own cistern in there that took all of the water supply from this spring, and the cistern was used for both their domestic supply and the supplying of the pack trains that were used in bringing material up from the Kawaihapai side of the ridge.

Q. Is it not true in regard to that supply, however, that the cattle were allowed free access to this new supply that the Army personnel had there?

A. No.

Q. Allowed to use it along with the pack train?

A. No, they couldn't have gotten into that cistern if they wanted to. It was quite a high cistern. It actually shut the cattle off from that.

Q. How did the pack train get into it?

A. A pack train is under halter all the time and he is tied up at night, and they take the water to him.

Q. With regard, again, to your cattle valuation, that is based on previous marketing experience, is it?

A. Yes, that is among the items considered. Also the—Do you want me to elaborate on it?

Q. I would like to know how you arrived at it.

A. Also the fact that at the time the Inter-Island transportation was shut off. There were Japanese submarines around here at the time, if you recollect, and there was an impending short-

(Testimony of Alfred Lester Marks.)

age of beef. And all of those matters were [74] taken into consideration.

Q. But your cattle values were based upon cattle delivered for market; is that correct?

A. Not necessarily.

Q. What I am getting at is: If you were to sell those cattle, you wouldn't just sell them out in the field and let them come and get them and round them up?

A. Sometime you do, if another person has an area that has feed on it and you don't, he will come and buy so many head, so many hundred head. They call them store cattle.

Q. You think you could have sold the entire cattle you had out there at \$100 a head to somebody to come in and take them as they found them?

A. I think at that time they would have been glad to get them.

Q. Mr. Marks, do you recall that it was about 1943 when you first submitted a claim to the Army, maybe not the first time, but you did submit a written claim to the Army in 1943, at which time you claimed the loss of 369 head of cattle?

A. I believe so.

Q. Then that number at that time, 369 head, I presume was based on the same type of figuring that you now compute 366; in other words, that you estimated you had around a thousand head of cattle and deducted the number you had taken [75] from that; is that right?

A. No, we estimated—I went out with the fore-



(Testimony of Alfred Lester Marks.)

man and we estimated about how many head we left—we had to leave in each location.

Q. Don't you have to do that by estimating how many head you had to start with and deducting the number you caught from it?

A. Not necessarily. The figures ought to check somewhat.

Q. That is pretty big figuring, isn't it, to estimate the number of cattle still ranging around on a large area?

A. No, I don't think so. You see a group here and a group there, and we knew at the time that the area was being run over, you might say, by troops—there were troops all over the place, and the cattle in the daytime were down in among the trees in the gulches, and it was the best estimate that we could make at the time.

Q. Do you think that is a satisfactory way of estimating or arriving at the number lost, to take the over-all picture and deduct the number you caught; wouldn't that be more accurate?

A. I think either of them, in competent hands, would be a fairly good estimate of it.

Q. In any event, in 1943 you put in a claim for 369 head as being lost? [76]      A. I think so.

Q. You recall in the Congressional Committee hearing that you stated that in 1944 and 1945 you caught an additional sixty-two head of cattle?

A. I don't recall making the statement, but that was a little closer to the time of actual operation

(Testimony of Alfred Lester Marks.)

than it is now, and if I said that, it is probably right.

The Court: When was that, Counsel?

Mr. Anthony: October 16, 1945, that hearing.

The Court: Well, what I meant was, when was the statement made that they later caught 62?

Mr. Anthony: October 16, 1945.

Mr. Deuel: You mean catching the 62 head additional?

The Court: Yes.

Mr. Deuel: That, your Honor, was made at this hearing in 1945 pertaining to a period in the year October, 1944, to October, 1945, "we caught 62 more head."

The Court: Well, between 1944 and 1945.

Q. (By Mr. Deuel): I am reading from the testimony, Mr. Marks. A. Yes.

Q. Therefore, on your own figures——

Mr. Anthony: What page are you reading from?

Mr. Deuel: Thirty six, just about the middle of the page. [77]

Q. (By Mr. Deuel): On your own figures, then, if you had lost 369 head in 1943 and later caught 62 head, that would reduce your losses by 62 from 369?

A. Not necessarily. I might have been 62 low in my other figures.

Q. As time goes on your original estimate gets higher and higher?

A. No, no. What page in the transcript is that, because I don't recall?

(Testimony of Alfred Lester Marks.)

Q. I can show it to you. It is at page 36, Mr. Marks, at about the center of the page.

(Witness examines document.)

Q. Coming to your pigs that you had up there, Mr. Marks, most of those pigs were pretty much of a roaming lot, weren't they, and practically the same thing as the wild pigs that you find around the country?

A. They were roaming, but I wouldn't class them as wild pigs.

Q. What manner of control did you exercise over those pigs?

A. We had a pig pen and they would come into it occasionally. The sows that were about to give birth were usually kept in the pig pen in the immediate vicinity of the house, and then after that they were allowed to roam over the pastures, and so forth. [78]

Q. Isn't it true that pigs ranging over a wide area and ranging up through the forest reserve and all become practically as wild as wild pigs?

A. I never thought so.

Q. Do you find you can just go out and catch them easily?

A. Yes, you can catch them as easily as you can any pigs. Pigs in general are not easy to catch.

Q. You have to round them up first, you have to get them into a pen?      A. Yes.

Q. If they are ranging all over the country, that is quite a job?

(Testimony of Alfred Lester Marks.)

A. Sometimes it is hard to catch them in a pen, too, if you don't have the proper corners, and so forth.

Q. You actually had no way of counting all those pigs you had either, other than just making a general estimate?      A. That's right.

The Court: Did you have any place where you fed them?

The Witness: They were fed right near Peter Andrews' house there.

The Court: What did you feed them?

The Witness: We fed them middling, particularly the sows that had the young ones, and then we kept some [79] pedigree boars there, too, imported stock, and those we fed, and the others would roam around and eat algaroba beans and roots and sweet potatoes and other things.

Q. As a general thing, most of these pigs lived off the ground out there?

A. No, I don't think that is——

The Court: They ranged clear up into the forest reserve?

The Witness: Yes, they did.

The Court: Do you have a pig license to go into the forest reserves and shoot them?

The Witness: We had the ingress and egress fairly well under control there, and occasionally they would go up and catch pigs, the wild pigs, the cowboys would go up into the forest reserve and get them, but there is a difference between your wild pigs and these others. Your wild pigs are

(Testimony of Alfred Lester Marks.)

taller and rangier, and these others, well, you might say, had an air of refinement about them. They had a little better lineology than the wild pigs would.

Q. (By Mr. Deuel): More aristocratic?

A. Yes.

Q. You stated that these pigs disappeared in various ways, I believe.

A. Yes.

Q. Did you make an effort to do anything about getting [80] them in and taking care of them after the war had broken out?

A. No.

Q. And what ways did you say these pigs disappeared?

A. A lot of them were eaten. All of the soldiers in the messes around there were bragging about what fine pork diet they had, and I think they were enjoying the roast pork. If you would go up to Kuaokala—on two occasions we saw some soldiers on the way down with a couple of live pigs, just little ones, on the way to make presents of them to some of their friends they had made acquaintances with.

Q. They had gone out and stolen pigs?

A. Up there they would entice them around the camp. They would leave their slop out and the pigs would walk out and eat it and they would grab them. Some of them had pet pigs up there.

Q. Had what?

A. Pet pigs, pigs that would come when they would whistle.

Q. Would you say quite a number of your pigs disappeared in that way?



(Testimony of Alfred Lester Marks.)

A. I think all of them did, unless there are some still there, which I don't know. There are hunters going up there now from—on both sides. There may be some of them still there for all I know.

The Court: You didn't recover any pigs? [81]

The Witness: No, we recovered no pigs.

The Court: During the time you were in sort of joint occupancy there after the blitz, did you do anything about your pigs?

The Witness: We—those around the main camp there, we moved down to Waimalu. We had the purebred boar and four or five of the sows we moved down to Waimalu, but out at Makua there we didn't have the facilities to take care of them any more.

Q. (By Mr. Deuel): May I refer you to Lease No. 1740, Mr. Marks, which provides for an annual rental of \$1410. Did you handle any of the payments for these leases so that you knew how much you were paying on that lease?

A. I didn't personally make any payments. Mr. McCandless handled that until his death in 1940, in August, and then I was administrator, or at least I was executor, and the Bishop Trust Company was administrator, and such matters as that, after his death, were automatically paid. There was no—

Q. Aren't you aware that from that lease in 1929 that an area of 8.84 acres was withdrawn by executive order?

A. I don't recall it.

The Court: How many acres?

(Testimony of Alfred Lester Marks.)

Mr. Deuel: 8.84 acres, your Honor, was withdrawn by executive order in 1929.

Q. (By Mr. Deuel): You don't recall that that was done [82] or know of anything about that?

A. No.

Q. And when you were Commissioner of Public Lands, you didn't have any occasion——

A. I didn't become Commissioner of Public Lands until 1943.

Q. I realize that, but in checking through the records for this claim, you weren't aware of the fact that that area had been cut down?

A. No.

Q. Now, you recall, Mr. Marks, in fact you mentioned something about it, the Army moved and built improvements for you, for the McCandless Estate, on the Ohikilolo property?

A. That is correct.

Q. In conjunction with the moving of the ranch?      A. Yes.

Q. And you made a request for those improvements to be constructed or moved, did you not?

A. I did.

Q. I am going to mention these improvements to you. I want to see if you recall that one 16.8 by 30-foot demountable was built on the Ohikilolo property by the Army for you.

A. I wouldn't specifically know. There were a number [83] of those built, possibly five or six.

Q. If I told you there were closer to ten——

(Testimony of Alfred Lester Marks.)

A. It would be possible. I don't recall that number, though. Some of them the Army came and took over themselves right away, though.

Q. But they were put up for you on the Ohikilolo property?

A. But the Army did put some troops there. The Makua Valley was a combat range, and the personnel that was attendant to the combat range, and that were stationed there permanently were lodged in some of these quarters in Ohikilolo. That was a subsequent transaction, however.

Q. Those buildings and improvements——

The Court: Where is Ohikilolo?

Mr. Anthony: That is your fee simple land; is that right?

The Witness: Yes. This is Ohikilolo here (indicating). The Army replaced some of the homes in Makua on the beach here (indicating), and they built us some quarters, replaced some of the quarters on the fee simple land that they took here (indicating), but some of those quarters were almost immediately repossessed by the Army to house their own personnel who were the permanent personnel attached to this as a combat range.

Q. (By Mr. Deuel): Those buildings, though, were left [84] and still on the Ohikilolo property, are they not?

A. No, some of them were removed when the Army abandoned that camp. That camp had a name, and most of those camps had Mainland names that would be Camp Wisconsin or something

(Testimony of Alfred Lester Marks.)

of that kind, and that had a name that I can't recall, but that was in the area that was occupied, that is if I am talking about the same house that you are. However, those that are on the beach here that were built for the Hawaiian families in here——

Q. I am not actually talking about those. We are eliminating those from our consideration.

A. Yes.

Q. In addition to the buildings that were put up, the Army also constructed some fence for you; do you recall that?

A. I don't recall the fence. They put up some water tanks.

Mr. Anthony: I object to this unless it is confined to the land in question, your Honor. There was a condemnation proceeding brought against the land which the trustees owned in fee simple. That has been settled and has been paid for, and apparently these questions are directed to that, a matter in which final judgment has been entered; if it has to do with the lease in question, it is something different.

Mr. Deuel: If Counsel has objection to this, I am [85] willing to make Mr. Marks my witness for this purpose, your Honor. It has to do with the defense set-off that we have pleaded with regard to this matter of moving and the loss to them of their ranch, if it is allowed.

Mr. Anthony: I don't see the relevance of that at all, your Honor. There was a condemnation proceeding that has been settled.



(Testimony of Alfred Lester Marks.)

The Court: As I get it, more by inference than anything else, he is trying to show that the Army was trying to make good the seizure of that valley land there by their giving the tenants some other facilities on their own land.

Mr. Anthony: That is correct.

The Court: Well, that might be regarded as something that was paid on account, if it had any value, paid on account to the damage.

Mr. Anthony: Yes, but the difficulty with that is, your Honor, in a subsequent proceeding the value of those properties and the land was taken into consideration in arriving at a settlement with the United States. That money has been paid, and I think we are getting pretty far afield here.

The Court: That is true. I don't see where it is at all material in this case. It has all been thrashed out and considered in another proceeding for a condemnation fee.

Mr. Deuel: I agree, your Honor, that most of these [86] improvements are the ones for which these are to take the place had been on that fee land and that is part of my contention. The McCandless Estate, in settlement of that condemnation proceeding, was paid for the land and for the improvements. Now, in addition to that, the Army has built them a number of improvements, put up fences and water tanks, and so forth, on their fee land, after having paid them for the ones in conjunction——

Mr. Anthony: He has it twisted.



(Testimony of Alfred Lester Marks.)

The Court: Mr. Anthony says these things that the Army did for them were all taken into consideration in the condemnation proceeding.

Mr. Deuel: No, your Honor, that I disagree with. There was no consideration in that of the fact that new buildings had been put up for them. We paid them full value in that condemnation proceeding for the fee and the improvements.

Mr. Anthony: That is Counsel's statement.

The Court: As to the value of those buildings, I can't tell whether they were something that was built at the appeal or request of the McCandless Estate, which had been dispossessed, or something that was in the nature of some gratuity, and, as Mr. Marks testified, no matter why they built them, they came in and occupied them themselves.

Mr. Deuel: Mr. Marks just admitted that on behalf [87] of the McCandless Estate they had requested these improvements. I asked him that question a little bit ago.

The Court: I lost that.

Mr. Anthony: The point of the thing is, these buildings were put on a parcel of land which the United States Government condemned in fee simple.

The Court: They didn't condemn this section over here (indicating)?

The Witness: No. They were removed from parcels of land.

The Court: Removed from parcels of land. Did they have any new material?

(Testimony of Alfred Lester Marks.)

The Witness: In some of them.

Mr. Anthony: But ultimately the land was condemned. That is the point I am making. And there was a settlement.

Mr. Deuel: That isn't correct. I must have misled you in my statement.

Mr. Anthony: Go on. I will straighten them out in cross-examination.

Mr. Deuel: These improvements were located on their Ohikilolo property where they are still operating.

Mr. Anthony: Do you understand the question, Mr. Marks?

The Witness: May I have it repeated?

Mr. Deuel: I am asking you about the extent of the [88] improvements which the Army, after your request, placed upon the Ohikilolo McCandless property.

The Witness: I made a request that certain facilities be replaced in Ohikilolo. Most of those facilities, except the house and guest cottage, were on fee simple land in Makua.

Mr. Anthony: Belonging to whom?

The Witness: Belonging to L. L. McCandless. And those were placed on fee simple land in Ohikilolo, and in the settlement of the condemnation of the fee simple land in Makua, when I was requested to submit a figure that I would compromise on, I took that into consideration. The house, however, was not moved.

The Court: The old Frank Woods house?

(Testimony of Alfred Lester Marks.)

The Witness: The old Frank Woods house.

Q. (By Mr. Deuel): That was on the leasehold?

A. That was on the leasehold. We had had an agreement whereby there was to be an exchange of that house for a similar house in Kona, and it was a school teachers' cottage, and the school teachers had already moved in, but the papers had not gone through for this improvement on the leasehold at Makua, and that's why we wanted it moved, if possible.

The Court: The agreement was with the Territory?

The Witness: With the Territory. But that was why I asked for that house to be moved also, but it was not moved. [89]

Mr. Deuel: I have here, your Honor, a copy of the settlement that was made in Civil 485 and I ask your Honor, since it was in this court, to take judicial notice of the settlement there. There was no mention made of any deals for improvements. I believe the record will show the payment was for complete taking of the land, which would include the improvements.

The Court: Well, it was a compromise settlement out of court, wasn't it?

Mr. Anthony: That is right.

Mr. Deuel: It was settled by stipulation.

The Court: Mr. Marks says that in compiling his figure as to what remained to be paid by way of final, full settlement he took into consideration

(Testimony of Alfred Lester Marks.)

the fact that the Army had made available, or reconstructed, or transferred, some buildings on the land that was taken and rebuilt in other land that belonged to Mr. McCandless in fee, and he took that into account, so that that would be hidden, according to his testimony, now, in the figure that he submitted as one which he would be willing to settle for; is that correct?

The Witness: That is correct.

Mr. Deuel: That is merely their side of the story, then, your Honor.

The Court: Yes, true.

Mr. Deuel: The Government does not concede that [90] the settlement was made on that basis.

The Court: All right. The story as to what operated in Mr. Marks' mind in arriving at a figure will stand until it is overruled.

Q. (By Mr. Deuel): In that regard, Mr. Marks, I have before me a letter dated April 29, 1947, from you, as executor of the McCandless Estate, to the Real Estate Claims Officer, District Engineer, with regard to that question. Do you recall that letter?      A. Yes.

Mr. Deuel: This letter pertains to that question as to whether or not the improvements were considered in that settlement or not, your Honor, and I offer it in evidence.

Mr. Anthony: The settlement wasn't made until six months ago. This is dated 1947.

Mr. Deuel: This letter, however, has a statement in it from Mr. Marks as to what would be contem-



(Testimony of Alfred Lester Marks.)

plated in the settlement and that the improvements would be considered in that settlement.

Mr. Anthony: This was two years before we even began to negotiate with Mr. Dolan.

The Court: Dolan was not here in 1947?

Mr. Deuel: Not in 1947, your Honor.

Mr. Anthony: Just last year Mr. Marks and I settled it with Mr. Dolan. [91]

Mr. Deuel: And myself, your Honor; I was in on the conferences.

The Court: What is it you have there? Something you want to put in?

Mr. Deuel: This letter, your Honor, I wish to submit as bearing on this point. It has to do with this claim in general, and one portion says:

“In further explanation, the remaining portion of the ranch consisting of approximately 165 acres of fee simple land——” That is the part we were just talking about settled in 485. “——is under condemnation by the federal government, and since it is the usual procedure to determine the value of improvements, etc., at the time of taking and allow interest on this amount up to the time of payment, it was not deemed proper to include these items in the claim as made.”

That is referring to the claim made to the Army and on which this claim now is based, intimating there the fact that the condition was to be paid for those improvements in this settlement which was made, and I submit it is proper to put in evidence.

The Court: All right, you offer it?



(Testimony of Alfred Lester Marks.)

Mr. Deuel: I offer it.

The Court: Accepted.

The Clerk: United States Exhibit No. 1. [92]

(Thereupon, the document above referred to was received in evidence as United States Exhibit No. 1.)

Q. (By Mr. Deuel): Mr. Marks, with regard to these improvements, do you recall in the Congressional hearing, again referring back to that, in 1945 having commented on those improvements?

A. Yes, I did.

Q. And at that time you stated that you have had some contracting experience, building experience, and that in your estimation, as you stated, in normal times you would do the building for one-half of the stated figure, which was one-half of 23 thousand something? A. Yes.

Q. There you referred to normal times. At the time, being 1942, can you state how much higher your figure would have been?

A. You mean for the replacement of those?

Q. That is right.

A. I would have to get out the cost index on that and go into it. At the time I made that remark, it was rather a side issue that was commented upon by, I believe, one of the members of this committee of Congress.

Q. Your recollection is correct.

A. And inasmuch as we were not making a claim for the improvements, that is, the houses and

(Testimony of Alfred Lester Marks.)

water tanks, and so [93] forth, in our claim, I wasn't particularly careful about my answer to that. It was something to me that was outside the issue before the Committee there and was outside of what we are making a claim here for.

You see, when—the first claim that we went before this Army committee on contained all of the elements of damage that had been done to both the leasehold and the fee simple. That was before suit was filed on our fee simple land so that when it became—after suit was filed on our fee simple land and it became apparent that we were going to be paid for that under the condemnation of the fee simple, I dropped that from this claim that we are considering now, and the remark that I made then was just an off-hand remark in reply to his reference to something that I didn't consider germane to the issue under discussion.

The Court: You asked the Court to take notice of a settlement that was made for his fee land and improvements, did you not?

Mr. Deuel: Yes, I have a copy.

The Court: What settlement was it?

Mr. Deuel: I am sorry, your Honor?

The Court: What was the settlement?

Mr. Deuel: I have a copy here.

Mr. Anthony: Civil 485, \$65,000.

The Court: How many acres involved? [94]

The Witness: One hundred sixty-six.

The Court: Was there any division between improvements and land?

Mr. Deuel: Just a \$65,000 settlement. "That the

(Testimony of Alfred Lester Marks.)

fair market value and just compensation which should be paid for the taking of the full, free and unencumbered fee simple title to Parcels 2, 3, 4, 5, 6, 7, 11, 12, 13, 14, 15, 16, 18 and 19, as described in the petition of condemnation as amended and declaration of taking as amended filed herein, is the sum of \$65,000.00, and which sum includes any interest due \* \* \*'' It does not break down the improvements from the land.

The Court: And the condemnation was filed when?

The Witness: '43.

Mr. Anthony: March, 1943.

The Court: But they had taken possession——

Mr. Anthony: March 23, 1943.

The Court: They had taken possession of everything in 1941, December of 1941?

Mr. Anthony: That's right.

The Court: And then the settlement was made when?

Mr. Deuel: This was filed, your Honor, July 1, 1949. This includes interest, your Honor.

The Court: I know, but there were about six years between the entry for condemnation and the time of the settlement.

Mr. Deuel: That is right, your Honor. There was, of course, a deposit made with the declaration of taking.

The Court: What deposit was made? [95]

Mr. Deuel: I would have to check the record, your Honor.

(Testimony of Alfred Lester Marks.)

The Court: It isn't important. No division there as to any improvements, just assessed the land at so much, which covered the improvements.

Mr. Anthony: The deposit, your Honor, was \$18,178.

Mr. Deuel: Mr. Marks just stated, your Honor, that they had withdrawn their claim from the improvements at the time of that previous hearing because of the fact that they were to be settled in connection with the condemnation of that land. I contend that having been settled there that any improvements placed on the Ohikilolo land are subject to set-off in favor of the United States in the event an award is made for the leasehold in this instance in connection with the ranch operations.

The Court: What was that? I don't follow that. Say it again.

Mr. Deuel: The Government in its answer, your Honor, is pleading a set-off for the value of these improvements placed by the Government on the McCandless fee owned Ohikilolo land where these improvements were placed, in the event an award is allowed the McCandless Estate for damages in conjunction with the occupation of the leasehold premises.

The Court: We haven't heard anything about the fee owned premises in the Plaintiff's case so far. I don't recall making any claim for payment on the leasehold.

Mr. Anthony: That is anticipatory. That is their [96] defense. I assume Counsel is going to

(Testimony of Alfred Lester Marks.)

put on their counter-claim at the conclusion of our case, but it is dragged in at the present time on cross-examination of Mr. Marks, so in that sense it is anticipatory of the defense.

The Court: Yes. I couldn't connect it.

Mr. Anthony: As far as we are concerned, that is not part of this case at all.

Mr. Deuel: I bring that in because Mr. Marks is on the stand now.

Q. (By Mr. Deuel): Mr. Marks, getting down to the cancellation of the leases in 1942, you received letters of cancellation, notices of cancellation from the Commissioner of Public Lands at that time. Did you or the McCandless Estate make any reply to those notices?

A. Not that I recall.

Q. You stated that you did make a tender of rent to the Territory.

A. That's correct.

Q. I show you a letter dated January 24, 1944, from the McCandless Estate, signed by the Bishop Trust Company and by you, addressed to yourself as Commissioner of Public Lands in the other capacity, and I ask you if you recall that?

A. Yes.

Q. This letter pertains to a tender of rent on these leases? [97]

A. Yes.

Q. And that was the 24th of January, 1944. It is true, is it not, that this was the first tender that you made after the notices of cancellation?

A. That's correct.

Mr. Anthony: No objection.



(Testimony of Alfred Lester Marks.)

The Court: Tender of what?

Mr. Anthony: Offer to pay the rent under the two leases.

The Court: Oh, yes.

The Clerk: Government's Exhibit No. 2.

(Thereupon, the document above referred to was received in evidence as U. S. Exhibit (No. 2.)

Q. (By Mr. Deuel): That first tender that we just referred to was over a year and a half, between a year and a half and two years after the notices of cancellation? A. Yes.

Q. With regard to your loss of cattle, Mr. Marks, do you recall making a statement before the Congressional Committee—I am referring to page 33 of the report regarding the loss of cattle, and you stated that “we recognized——” “We know some of them got into the slaughter house that we recognized as our bulls had been marketed by others.” A. Yes.

Q. Did you find very much of that? [98]

A. Well, we don't hang around the slaughter house all the time. I was just on a casual visit to the slaughter house, and, oh, I would say that on two or three occasions—I didn't personally see them. It was reported to me by my employees.

The Court: Well, had you instructed your employees to make an investigation of that?

The Witness: No, they were down in conjunction with slaughtering some of our own cattle.

(Testimony of Alfred Lester Marks.)

The Court: You didn't have your cattle branded?

The Witness: Some of them, but not all of them by any means.

Q. (By Mr. Deuel): Mr. Marks, have you ever received any reimbursement on this lease for rent paid, specifically referring to the Lease 1741, for the approximately last six months of the lease prior to the cancellation date?

A. Yes, I think there was a payment of six hundred and some dollars.

Q. If I told you that you before stated that to be \$671.63 for the period to December 29, 1942, that is correct, is it?           A. Yes.

Q. You received that from the Army or from the Government?

A. We received that from the Army. That was brought [99] about by the fact that the Territorial Land Office had no facilities under which they could repay rent, refund rent, and so Mr. Whitehouse asked us to enter into a sub-lease for that period, and if you will read further——

The Court: Six months' period from June 29 to December 29, 1942?

The Witness: Yes.

The Court: And that was a half year's rent——

The Witness: That was a half year's rent.

The Court (Continuing): ——that you had already paid the Territory, and the Army paid it back?

(Testimony of Alfred Lester Marks.)

The Witness: The Army reimbursed us.

The Court: Did you pay the same rental on both of those tracts, both leases?

The Witness: I think there is a slightly different amount of rent there.

The Court: Well, I mean by the acre. There is a difference in acreage.

The Witness: I would have to check that up before making a reply on that.

The Court: Well, have you the leases here in court?

(Documents handed to witness.)

The Court: It would be in the beginning, wouldn't it?

The Witness: It usually is, but on Lease 1740 the [100] rent is \$1410 for 2275 acres, or approximately 62 cents an acre. On Lease 1741 the rent is 1290 for 2517 acres, or around 51 cents an acre.

The Court: Fifty-one cents an acre?

The Witness: Yes. Twelve ninety for 2517 acres.

The Court: Yes.

Q. (By Mr. Deuel): One more question with regard to your fencing, Mr. Marks. You stated that in the Makua area, that is, Lease 1740 area, that you had some cross-fencing in there. Is it not true that it was just about that time that you were in process of breaking that into paddocks and you were in process of constructing that cross-fencing?

A. No, we had completed those cross-fences.

(Testimony of Alfred Lester Marks.)

Q. Now, with regard to the cost of recovering your cattle, those that you caught and brought in, is it not true that had you gone in and rounded up all the cattle that you had just prior to December 7, that you would have had some expense in catching your cattle and moving them?

A. That is correct.

Q. And your expense would have been pretty much the same as it was in this instance that you testified to?

A. No, we would have had the fences to drive them along, which would have greatly facilitated catching them. As it was, with the fences down, where you start after them and they spread in all directions, it greatly increases your [101] problem of rounding them up. Had the fences been intact we would have been able to get them all out of Makua.

Q. You would have a considerable problem with those up in the plateau area, Lease 1741?

A. Yes.

Q. You have to bring them down the hill. That is an expensive proposition?

A. That was expensive.

The Court: You mean that the fences you had recently built were utterly demolished? As I got your explanation before, they had opened them to carry or haul stuff through.

The Witness: They had cut the wire and when you cut a wire, your whole fence collapses.

The Court: True enough, but when you stretch

(Testimony of Alfred Lester Marks.)

the wire back again, you have rehabilitated your fence to a large extent.

The Witness: Well, we couldn't rehabilitate it faster than they would drive through it with their tanks and vehicles.

The Court: For round-up purposes couldn't you do that? Your round-up would only last during the part of daylight for certain days.

The Witness: Well, to have done that would have been more expensive in our estimation than it was just to go [102] in and catch what we could, because there were emplacements built. There were lines of barbed wire built and all manner of military installations.

The Court: Well, do you figure that the cattle actually abandoned the land included in these leaseholds, ran into the forest reserve and were lost there, or just simply couldn't be found in the leasehold? What was the situation?

The Witness: In the Makua area there were still a number of cattle which we took off and which we put in the \$2-a-head to round them up, but those that we are making claim for were those that when we would try to round them off would run up into the forest area and we couldn't catch them.

The Court: Those bulls that your men identified as belonging to the Estate which found their way into slaughter houses, did you ever ascertain who brought them into the slaughter houses?

The Witness: Yes, they were caught over on the Dillingham property at Mokuleia. After the cattle



(Testimony of Alfred Lester Marks.)

got up into the Mokuleia Forest Reserve, the fences were also down on the other side and they would go out into the other area and be caught.

The Court: Largely what you lost Dillingham got the benefit of? [103]

The Witness: He did, and there were other people allowed up in here to catch them.

Mr. Anthony: Did you ever ask Dillingham for them?

The Witness: There was one group I did. We received a letter from the Board of Forestry telling us that some of our cattle were in the Mokuleia Forest Reserve and we went up and were driving some across to get them out on the Mokuleia side, and Mr. Dillingham had the cowboys arrested and they took the cattle. He seemed to think that they were his.

The Court: You got them back?

The Witness: No. Those were among the cattle that we had lost. I couldn't claim them from him.

The Court: How many were there?

The Witness: In that bunch there were about twenty, as I recall. I was not up there myself.

Q. (By Mr. Deuel): How many did you say, Mr. Marks? A. About twenty in that group.

The Court: You figured, I guess, that it is an ill wind that doesn't blow Dillingham some good.

Q. (By Mr. Deuel): Was there more than one occasion when cattle were lost in that way?

A. No, that was the only occasion. The Board of Forestry after that withdrew their request to us

(Testimony of Alfred Lester Marks.)

specifically to go up and get those cattle, so we didn't hear any more [104] about that particular phase of it, although we did know that there were people going up into the Kuaokala from the Kealia side and were catching the cattle.

The Court: Dillingham was willing to admit that his cattle ranged over in the Forest Reserve?

The Witness: Well, we didn't go into the details of it.

Q. (By Mr. Deuel): You state that there were quite a number of your cattle lost to other people, picking them up and putting them in with their herds and taking them to the slaughter house?

A. I think so, yes.

The Court: Well, Dillingham is the only neighbor bordering, that is, cattle raiser?

The Witness: He was the only cattle raiser. I think other people would go shooting up there. The current rumor was anyone who wanted meat would come up the Dillingham side, shoot a bullock and be allowed to take it.

The Court: Be allowed to take it out through Dillingham's property?

The Witness: Through the trail that goes down there. It was a well established trail going up over the land of Kealia, which was built by the CCC and was greatly improved by the Army and used by them.

The Court: Practically all that whole mountainous [105] country there was policed by the Army about that time, though, wasn't it?

(Testimony of Alfred Lester Marks.)

The Witness: Yes.

The Court: Wouldn't it have been very difficult for anyone to go out and slaughter beef?

The Witness: No, I don't think so. I don't think they had any objection to it.

Mr. Deuel: That is all the questions I have, your Honor.

The Court: Mr. Marks, relatively, as between the two leases, Makua was the better in cow feed, wasn't it?

The Witness: Yes. Yes, it was.

### Examination

By the Court:

Q. Well, taking them upon the whole, about how many acres would you figure to maintain per head of cattle, that is, in rotation?

A. I would say that would average about five acres to a head.

Q. Five acres. Well, there is quite a lot of waste land in those two leaseholds?

A. There is more waste land on Kuaokala than there is in the Makua area.

Q. It is practically good only for goats?

A. Well, there were quite a few cattle up there.

Q. And did you have any regular seasonal round-ups for marketing purposes?

A. Not during my control over it. At Makua here, we had, as I testified, recently cut it up into four paddocks and make our fences tight, and we

(Testimony of Alfred Lester Marks.)

were having that so that we would have resting periods of the paddock. We had not carried our fencing program yet up onto Kuaokala.

Q. Will pasturage upon the whole lend itself to certain fattening seasons? A. Yes.

Q. Algaroba beans; you took advantage of that, didn't you?

A. We did, and this was also run in conjunction with the Ohikilolo area. That is on the Honolulu side next door and there was quite a bit of koa land in the upper regions of that.

Q. Koa. A. That is, haole koa.

Q. In the upper regions they would grow continuously green the year round?

A. Yes, it would.

Q. How long prior to the blitz day had you marketed any substantial amount of cattle?

A. Not, in any great numbers. We did send, oh, maybe two or three a week to market in certain seasons. [107]

Q. Well, what did you do? You just drove those, the nearest at hand, out of Makua?

A. Well, Makua and Ohikilolo. In the upper part of Ohikilolo you could pretty near always get fat cattle. That was the choice fattening land. As we would take them out of there, we would replace them from the other areas, and also have an occasional round-up and spot so many, fifty, and then keep them in a smaller enclosure so that they would be available as orders were received.

(Testimony of Alfred Lester Marks.)

Q. You sold through Hawaiian Meat?

A. We sold to Hawaiian Meat. We also sold some to Meat Market at Waipahu.

Q. You at one time maintained a slaughter house of your own?

A. We had a slaughter house of our own at Waimalu, which was in operation at the time and after the blitz.

Mr. Deuel: With the Court's permission, I have one further question.

The Court: Yes.

Cross-Examination

(Continued)

By Mr. Deuel:

Q. I just want to get straightened out—I think I understand, but regarding these paddocks that you put into Makua, as I understand it, Mr. Marks, and will you tell me if I am correct, you were putting in paddocks, you say, four of [108] them, quartering it, and you had a fence running, roughly, from the center by the sea towards the mountains, and then you had a cross-fence running, I guess, north and south across to quarter it, across the valley, is that it?

A. It wasn't quite a continuous fence. One of them was higher than the other, but you would notice that the Kahanahaiki area is shallower than the Makua, so that a line cutting them in half wouldn't necessarily—but there were two cross-



(Testimony of Alfred Lester Marks.)

fences that virtually cut the Makua and Kahana-haiki into four paddocks.

Q. You had a fence running from the sea towards the mountains?

A. It was not quite at sea. It was above these kulianas. There were kulianas just down above the road and at the back of these kulianas there is enclosures, small paddocks there, and the rear fence on those small paddocks and enclosures was the makai fence of these big lower pastures, and the forest reserve fence was the upper.

Q. Roughly, the Makua and Kahanahaiki area you had quartered into four? A. Yes.

Mr. Deuel: That is all, your Honor.

Mr. Anthony: I may have some questions on re-direct, your Honor, but I have a witness here who is from down the country. I think I can finish [109] him.

The Court: All right.

(Witness excused.)

### JOHN K. NAIWI

called as a witness on behalf of the Plaintiff, being first duly sworn, was examined and testified as follows:

The Clerk: Just sit down, please.

### Direct Examination

By Mr. Anthony:

Q. What is your name? A. John K. Nawi.

(Testimony of John K. Naiwi.)

Q. And where do you live, Mr. Naiwi?

A. I live at Ohikilolo, Waianae District.

Q. How old are you? A. Sixty-one.

Q. How long have you lived at Ohikilolo, Waianae? A. Ohikilolo about 25 years.

Q. Did you work for the late McCandless?

A. Not at this time. At one time I did.

Q. Did you ever work down at the ranch?

A. No.

Q. Did you live down there?

A. I lived right at the ranch.

Q. Where were you on December 7, 1941?

A. December 7 I was at home in Makua Valley.

Q. After the war broke out on December 7, did you see [110] the Army come down to Makua?

A. Well, there were two squads, and a couple of sergeants and one second lieutenant, the only Army we had down there on the 9th, arriving down in Makua on the 9th.

Q. December 9. A. On December 9 it was.

Q. Did they come down to the McCandless ranch?

A. Well, they came and they established their camp right outside of my house and lot.

Q. Where is your house and lot?

A. Well, it is on the left side of the graveyard at Makua, Makua proper, not on the Kahanahaiki side, on the Makua side.

Q. After that did more troops come down there?

A. Oh, yes, it took them almost six months before a full company was down at Makua to patrol the sea frontage.

(Testimony of John K. Naiwi.)

Q. Now, what did the troops do down there?

A. Well, they built up barbed wire fence and they patrolled the place, built up fox holes, and placed 75 mm. big guns, machine guns.

Q. Do you know what happened to the cattle on the McCandless ranch?

A. Well, the cattle were—after the Army moved in, the cattle were scattered all over the place.

Q. Did you see them? [111]            A. Sure.

Q. Where did the cattle go to?

A. They go on the highway. The gates they removed, the gates on the highway, and of course the fence were cut. Who cut them, I don't know. I was block warden; naturally I see a lot of things that the other folks didn't see. That is, I go out patrolling sometimes with the guards to see that the Japanese put out their lights. And, of course, one night I saw the train come home, black-out with a little shaded green light, headlight, and all what I heard was a bang, collision. Well, after I went to see what it was; it was two horses that was killed at a bridge, cannot get across the bridge, so the engine came from Kahuku heading Honolulu way. That was at night.

Q. How did the horses get loose?

A. Well, there is a gate at the depot, Makua depot. Someone left the gate open. The next morning the gate was all open and the horses got into the railroad property.

The Court: You say this was a locomotive on a railroad track?

(Testimony of John K. Naiwi.)

The Witness: Yes, freight train.

Q. (By Mr. Anthony): There was not anybody around there except the troops wandering around, was there?

A. Well, the Military order that no one is supposed to be outside of your house after sunset and no one to walk [112] around during that time until the sun rises. I was there because I was block warden, and the Japanese don't quite understand English; you have to use a lot of pidgin language, you know, so I have to go and tell them to cut out their lights.

Q. Didn't you tell the haoles to cut out their lights?

A. There was no haoles there, only haoles were soldiers.

Q. Did you ever go up in the valley?

A. Sure.

Q. Makua Valley? A. Yes.

Q. Did you see the fences cut up there?

A. I didn't see——

Mr. Deuel: Objection until we see what period of time this is we are talking about.

Mr. Anthony: After the blitz.

A. I didn't see the wire cut up at the reservation, but the fences were all good.

Q. (By Mr. Anthony): Before the war?

A. Well, during the war. I had to show the Army the trail, see; the lieutenant came down, didn't know the trail, Dillingham trail, and in case the enemy

(Testimony of John K. Naiwi.)

landed in Makua, we would have a way to get out, so I had to get all my children and the soldiers would go up in the mountain; so naturally we came across the fence. The fences were all right at the time, the first two or three weeks. [113]

Q. What happened?

A. After that nobody go up the mountain. We stay right around where we are at Makua.

Q. Now, do you have any idea how many cattle were down there on the McCandless ranch?

A. Well, it was a big flock, I know, but I couldn't tell you how many exactly in number. To me it looked like eight hundred, six hundred, around that way. Quite a big flock.

Q. Did you ever see any pigs down there?

A. Oh, yes, plenty.

Q. What happened to these pigs?

A. Well, some of the pigs, some of the Army boys shoot them, and I help to eat with them. And they were tame pigs. Some of them you can scratch on the back and turn upside down and lay down.

Q. Did you ever see any cattle that were shot out there?

A. I didn't see any at Makua, but there were two cows were shot by the lieutenant. It was an accident. The jeep, the patrolling jeep, hit one cow on the front leg, breaking the front leg, and then hit the other one from the rear, so he came over to get me because I was warden.

Q. Because you were what?



(Testimony of John K. Naiwi.)

A. I was block warden, so he came over to my house in the middle of the night, around 10 o'clock, because the freight [114] train just came back, coming towards Honolulu from Kahuku, and I think the cattle get frightened so got in head of the jeep, I think, so the lieutenant hit them.

The lieutenant asked me what I thought. I said, "To leave the cattle like this is pretty cruel." So he said, "I will shoot them." So all pau.

Q. Where was this, on the highway?

A. On the highway next to my house.

Q. Do you know whether or not the——

The Court: Weren't they dressed?

The Witness: Beg pardon?

The Court: Weren't they dressed? Didn't anyone skin them and butcher them?

The Witness: No, they killed them, and the next morning I went there and hide one—you know, clean them up, and the Japanese who work for the ranch came and took the other, so we share and share alike; everybody have a piece. The Army didn't want them, so we went over there and get them.

The Court: Pretty scrawny cattle, or what?

The Witness: Fat. Good meat.

Q. (By Mr. Anthony): Did you get some yourself?

A. Oh, yes, I got a hind quarter.

Q. You got what, a hind quarter?

A. Hind quarter.

(Testimony of John K. Naiwi.)

Q. Did you have any occasion to notice any pigs that were [115] killed or sold down there, McCandless' pigs?

A. I have seen soldiers come back with a pig, and I have seen them carry pigs to trade. You can get a big pig for \$10.

Q. They would sell a pig for \$10?

A. Sure.

Q. What kind of pigs were they? Were they wild pigs?

A. Wild pigs from Ohikilolo up in the mountains, but the other ones down in Makua, that is tame ones. You see, the soldiers' camp is right back of my house, so naturally I get some slop from them. I was raising pigs, too, and I get a share of the pig from them.

Mr. Anthony: No further questions.

### Cross-Examination

By Mr. Deuel:

Q. Mr. Naiwi, I believe you said that right after the 7th of December, about two squads of troops came down there.

A. On the 9th two squad, that would be about sixteen men and about four sergeants and one second lieutenant. And they didn't have a machine gun at that time. They brought a tripod, just the footing of the machine gun and stood in the church yard for two months before the gun came, so it was just the tripod alone, that is all, but no gun.

(Testimony of John K. Naiwi.)

Q. These troops were barricading the beach and occupying that [116] area? A. Yes.

Q. And you said it was quite some time later before a number of troops came? A. Yes.

Q. About six months? A. About that.

Q. You mentioned, I believe, two horses you said were killed on the railroad right-of-way, the train hit them? A. Yes.

Q. You have lived down there a number of years, haven't you? A. Yes.

Q. Isn't it true that there have been times in the past, I mean before the war, when some of the animals would get onto the right-of-way?

A. Oh, yes, sure.

Q. It happened occasionally?

A. Sometimes it happens, but this time, you see, the only person that walks out at night is the soldier and I the only civilian, so it couldn't be anybody else.

Q. With regard to the number of cattle that were down there, you say there was a large number; so far as you are concerned, you never made any count of them?

A. No, just when they are driving around. [117]

Q. When you get up to three, four, or five hundred cattle, that is quite a lot? A. Oh, yes.

Q. So you could miss your guess; you might say 400, 600, seeing them in a bunch; you wouldn't know the difference, would you?

A. It was a big flock.

(Testimony of John K. Naiwi.)

Q. These pigs you saw around there, they were mostly just ranging all over the valley; is that correct?

A. They roam around the ranch, but they have a regular piggery where they feed the pigs middling over to Peter Andrews' house lot, and they have a big bell that they ring and they all come back.

Q. There again, with regard to the pigs, you don't actually know how many there were; you have never counted the pigs? A. No.

Q. You just know there were quite a few of them? A. Oh, plenty.

The Court: Well, these wild pigs up in the forest, they had been there ever since you were a young fellow, hadn't they?

The Witness: Yes, different kind. The old kind of stuff there is a Poland China, long nose, and McCandless have the other white band. [118]

The Court: Berkshires?

The Witness: The heavy set pig, but the other is the kind Hawaiians use for luaus. Those are long nose; you know them when you see them.

The Court: Well, Poland China doesn't have a long nose.

Mr. Deuel: That is all.

### Redirect Examination

By Mr. Anthony:

Q. You testified that there were six or eight hundred cattle, you thought, in Makua. How about in

(Testimony of John K. Naiwi.)

the other parts of the McCandless ranch, did they have cattle in the other places there?

A. Well, they have cattle at Keawaula and Kuaokala, but Kuaokala quite rugged up there.

Q. You don't know how many were up at those other places? . A. No.

Mr. Deuel: Actually, you don't know whether there were six or eight hundred in Makua?

The Witness: No.

Mr. Deuel: There was a large number?

The Witness: Large number.

The Court: How much rainfall out there a [119] year, in inches?

The Witness: I don't know, but we surely have heavy rains.

The Court: Do they have a rain gauge?

The Witness: At Koolau Mountains.

The Court: But down in the valley they don't have any rain gauge?

The Witness: No, not down there.

The Court: Nobody kept track?

The Witness: No.

The Court: Gets pretty dry out there sometimes?

The Witness: Only during summer, around August, but otherwise we have showers right along, maybe one or two showers a month. We are having plenty this time.

The Court: Is that all?

Mr. Anthony: No further questions.

(Witness excused.)



Mr. Anthony: I have one more witness. I don't have him here. I will have him here in the morning. We will be ready to close then inside of an hour.

The Court: All right. Well, do you think we can get through tomorrow?

Mr. Deuel: I have several witnesses, your Honor; I don't think so. I was anticipating the fact that Mr. Anthony was going to take a little more time on his case. [120] Also, I want, at the conclusion of his evidence, a motion to dismiss Paragraph 3 of the Complaint, and I think we should have an argument on that.

I will have this one witness that I spoke of tomorrow morning. Mr. Anthony agreed we could put him on at ten, I believe, so I would just like to know whether you would like to have the other witnesses here tomorrow. In fact, I will have a second witness here in case it is necessary.

Mr. Anthony: I was hoping we would get finished up tomorrow. You don't think so?

Mr. Deuel: It will take some little time on this argument.

Mr. Anthony: Couldn't we take the evidence and have the argument at the conclusion of the case?

Mr. Deuel: I would like to avoid the necessity of putting on my expert witness, if possible.

The Court: There is not any reasonable doubt but what we can finish this case by Thursday noon?

Mr. Deuel: I have six or seven witnesses, your Honor. It will depend a lot on how long our argument on this motion takes tomorrow.

(Testimony of Kendell J. Fielder.)

The Court: Your witnesses won't take long individually, will they?

Mr. Deuel: No.

The Court: Is there much to go over with [121] them?

Mr. Deuel: I think probably we should be able to finish sometime on Thursday.

Mr. Anthony: Doesn't your Honor have an argument in the Matson case on Thursday afternoon?

The Court: I have two arguments on Thursday afternoon, and between the two of them they will take a big half-day, so that I have just about got to have Thursday afternoon for other things. Well, all right, we will do the best we can.

(Thereupon, at 3:55 p.m. an adjournment was taken to February 15, 1950, at 10:00 a.m.)

Honolulu, T. H.

February 15, 1950

The Clerk: Civil No. 886, A. Lester Marks and Bishop Trust Company, Limited, Executor, Administrator C.T.A., and Trustee of the Estate of L. L. McCandless, Deceased, Plaintiffs, vs. United States of America, Defendant. For further trial.

Mr. Deuel: In accordance with the understanding of Counsel and permission of the Court, I propose to call Colonel Fielder to the stand out of order at this time, your Honor.

Mr. Anthony: No objection.

Mr. Deuel: Take the stand.

## KENDELL J. FIELDER

called as a witness out of order on behalf of the Defendant, being first duly sworn, was examined and testified as follows:

The Clerk: Just sit down, please.

## Direct Examination

By Mr. Deuel:

Q. Will you please state your name, age, occupation, residence and citizenship.

A. Kendell J. Fielder; occupation, Army officer; age, 56.

Q. Residence? [123]

A. Citizenship, American; residence, Ft. Shafter, Hawaii.

Q. With regard to your occupation, Colonel, will you please give us a brief bibliography or history of your service and experience.

A. I graduated from college and entered the Army as a second lieutenant in 1917. I have been in the Army as a commissioned officer continuously since that date, rising through the ranks to Brigadier General and back to Colonel at the end of the second war.

I served in France in 1917 in command of a machine gun unit for about one year. Between World War I and World War II, I served at various stations, mostly in command of infantry troops. Three years I was in the Philippines in command of a company, two years at Ft. Meade, Maryland, in command of a battalion.

(Testimony of Kendell J. Fielder.)

During this time I went to several of the Army schools, one of which was the advanced course for infantry officers at Ft. Benning, Georgia; another for the command—at Ft. Leavenworth, which is known as the command and general staff school.

I came to Hawaii for duty in November of 1938 and served here continuously until 1946.

That, briefly, is an outline of my service.

Q. Then on December 7 you were stationed [124] where?

A. I was stationed at Ft. Shafter on the staff of General Short.

Q. At that time what were your duties, Colonel?

A. I was in charge of military intelligence for the Hawaiian Islands, both counter intelligence and combat intelligence.

Q. Had you been so assigned for a time prior to that?

A. I had been so assigned since June of 1941. Prior to that I was executive officer of one of the brigades stationed at Schofield Barracks.

Q. And immediately following December 7, 1941, and for the next several months what were your duties?

A. I continued on duty as G-2, which means the officer in charge of military intelligence.

Q. In connection with your duties during this period of time, that is, the time of the attack and for the next several months, up until, we will say, the battle of Midway, were you familiar with the

(Testimony of Kendell J. Fielder.)

general situation on the Island of Oahu from the military standpoint?      A. Yes, I was.

Q. And were you familiar with the general activities on Oahu during that period, particularly as they affected the military situation?

A. Yes, I was. I was probably more familiar with it than any other officer, because that was part of my duties. [125]

Q. Will you tell us what the activities were.

A. Well, the military activities after the attack on December 7 consisted primarily of the preparation for possible invasion, although the top military people—they didn't know whether the Japanese would attempt to land or not. The ground forces defending this island, in particular, had to be prepared. Consequently, most of the time was spent in stringing barbed wire and in placing artillery pieces, machine guns, mortars, 37 mm. guns, and light weapons and equipment for the defense of the beaches in the event of a landing of the Japanese.

Q. What was the general anticipation, particularly in so far as the military was concerned, with regard to possible invasion.

A. They thought it was possible that raids might be attempted by the Japanese, to say the least. An all-out invasion to capture the islands seemed not too probable, but possible. After all, the Military didn't think that the Japs would attack the place in the first place, so they felt that there was always a threat of an attempted invasion.



(Testimony of Kendell J. Fielder.)

Q. Was there a general anticipation of some attack or invasion?

A. There was definitely anticipation of raids, agents being landed from submarines, air tights, and the like.

Q. Was there any activity of that type after the attack [126] on Pearl Harbor?

A. There was one case where a lone Japanese plane flew from the Marshall Islands, refueled at Midway—not Midway, at French Frigate Shoals from a submarine, flew all over the island of Oahu and dropped bombs on the fifth of March, 1942. The bombs landed up back of Tantalus, and didn't do any damage, luckily.

Q. I refer you to an exhibit, Exhibit 1, showing the Kaena Point end of the Island.

The Clerk: That is Exhibit A.

Q. (By Mr. Deuel): It has already been brought forth that the lands involved in this suit are as outlined in blue on this map and designated by numbers here as Lease No. 1741 and Lease No. 1740. Were you at that time familiar with the general activities in those areas?

A. Yes, I was. In general, the two infantry divisions, the 24th and the 25th, were engaged in beach defenses, so-called. They had highly strategic mobile reserves around Schofield Barracks and other places and small units dispersed on the beaches. A great deal of barbed wire was put up, many machine guns were installed, particularly on the west shore of

(Testimony of Kendell J. Fielder.)

the Island, which had the best landing beaches. The best landing beach on the Island is down at Pokai Bay, which is several miles south of the area we are discussing. But all up that west coast it was necessary to place defensive guns, [127] to lay down interlocking bands of fire in the event of raids, and all-and-all out attack by the Japanese.

Q. These barbed wire entanglements you spoke of, you mean those were placed along the beach area?

A. Along the beaches in general and at certain strategic bottlenecks like down here at Maili, which is near Nanakuli. That was one of the key points. Another one is up at Kaena Point. Of course, there was no road around there, but it was possible if they landed at Makua it might be possible to work their way around, or even across the mountains, so consequently most of the landing beaches were pretty heavily covered with machine gun protection.

Q. With respect to the beaches in the Makua area, were there very many troops available?

A. No, because that was more or less the end of the line. As I say, they couldn't get around here. The big worry on this side of the island was Pokai Bay at Waianae and down at Maili Beach at Nanakuli. This was more or less the end of the line, and the road didn't go much beyond—I don't know how far, but not much beyond Makua Valley; so we didn't worry too much, yet there was a little stretch of beach there where agents and small raiding parties might have landed.

(Testimony of Kendell J. Fielder.)

Q. You mentioned something in the nature of artillery or defense pieces. What was the nature of those?

A. We had a great many batteries, both anti-aircraft artillery [128] and mobile light field artillery. They were placed all over the island, as a matter of fact, and if I remember correctly, some of those units were placed up in here (indicating); I don't know just where.

Q. You are pointing now to an area labeled on the map as Kuaokala Forest Reserve and Mokuleia?

A. Mokuleia, that general area, the idea being that they could shoot both to the north and to the west, from certain positions up there they could cover Makua Beach and possibly Mokuleia Beach, which is up on the north shore.

Q. What was the type of that artillery? Were they small or large pieces?

A. The largest we had early in the war were 75 mm. Later on they got 240 howitzers, but I don't believe they put them in that area.

Q. I believe you stated the purpose of that activity at Makua and Kuaokala, the two areas shown there, was for the purpose of defending the beaches?

A. Defending the beaches. In the event of invasion the invading force is most vulnerable when they hit the beaches. If they get a foothold and can get their support and weapons ashore, they are on almost an equal footing with a defending troop, but if you can catch them at the beach, if you can slow them up as they actually hit the sand, they are very

(Testimony of Kendell J. Fielder.)

vulnerable, and up to this time there had never [129] been a landing on a hostile shore that was defended, so we felt we could repel any landing effort if the beaches were well defended.

Q. Colonel, from your training and experience in military matters do you understand the term "combat activities"? A. Yes, I do.

Q. These activities that took place in this area that we designated on the map there, the area outlined in blue, in your opinion, from your experience, were the activities that took place there in the early days of the war, speaking up to the battle of Midway, combat activities?

Mr. Anthony: I object to that, if the Court please. I don't know whether your Honor gathers the purport of the question. The effort is to have the witness substitute his opinion for that of the Court as to what is "combat activities" within the meaning of the Private Act of Congress. The Private Act of Congress authorizes this Court to entertain jurisdiction of this case. Then there is a proviso which reads as follows: "That judgment shall not be rendered against the United States with respect to any part of the alleged damages for the loss of personal property, including livestock, which arose out of the combat activities of military personnel of the United States."

That is a question of law for this Court. We can have what the facts are. Obviously, I think, the purpose of that [130] certainly, one of the purposes.



(Testimony of Kendell J. Fielder.)

was not to have a duplication of the claims. That would be compensable under the war damage statute. In other words, the bombing, actual battle damage, was compensable under a different statute, not under this Private law. This is not a question of expert evidence.

Mr. Deuel: Your Honor, I construe the term "combat activities" to involve a mixed question of law and fact, and it is not intended that the witness shall substitute his opinion for that of the Court, but he is an expert and has been qualified as an expert in military matters of long experience, and his opinion as such expert in this line is to be brought forth, not to be substituted for your Honor's determination, but to assist your Honor in this matter, and I submit that his opinion is proper in evidence.

The Court: I will hear his opinion.

Mr. Deuel: Did you get the question?

The Witness: Yes, I have the question. It is very difficult even for a military man to define combat, but in a general sense everything that took place on this island shortly after the attack on December 7 involved combat. We construe our overseas tours of duty, for instance—if we are in a combat zone, although there might not be a shot fired, we get credit for combat service. So I would say that it certainly approaches a combat situation, although categorically it is a difficult question to [131 answer.



Mr. Deuel: That is all the questions.

Mr. Anthony: No questions.

(Witness excused.)

Mr. Anthony: Mr. Marks, will you resume the stand?

ALFRED LESTER MARKS

resumed the stand and testified further as follows:

Redirect Examination

By Mr. Anthony:

Q. You have already been sworn, have you not, Mr. Marks? A. I have.

Q. Yesterday you were asked by Mr. Deuel in regard to some 62 cattle which you testified were caught subsequent to the making of your report to the Army. Do you recall that? A. Yes.

Q. Over how long a period did that operation take place, Mr. Marks?

A. Over a year. My statement contained was that I believe from August, 1944, to August, '45, or October, that during that period we had caught 62 head.

Q. Now, in making your claim, you did not subtract the 62 head? A. I did not.

Q. Will you explain that, Mr. Marks.

A. Well, the cost of catching those was quite high and [132] I did not add the cost in either. Many times the cowboys would go over there and catch nothing, and we didn't add that cost to it, and we didn't add the cost when we actually did catch them, so the cost of catching those cattle and

(Testimony of Alfred Lester Marks.)

the salvage—the net salvage figure from catching them was rather an indeterminate factor. However, I felt that I wanted to bring out all of the facts, and also I was cognizant of the fact that I thought that my estimate of the number that we lost was on the very conservative side.

Q. Your estimate of the number doesn't purport to be a mathematical estimate or statement of the number of cattle that were actually lost?

A. No, it is not. It was our best estimate at the time, using all of the facilities that we had to make an estimate with.

Q. And you are still of the opinion that the figures that you gave on your direct examination is your best estimate of the number of cattle that were lost as a result of these activities?

A. I do.

Mr. Anthony: No further questions.

### Recross-Examination

By Mr. Deuel:

Q. It is still a fact, is it not, Mr. Marks, that you did, in 1943, submit a sworn claim to the Army that you [133] had lost 369 head of cattle?

A. Yes.

Q. And you did, in fact, as you just said, recover——

Mr. Anthony: Sixty-six, I think it was.

Q. (By Mr. Deuel): In 1943; you did in fact subsequently recover 62 head? A. Yes.

(Testimony of Alfred Lester Marks.)

Q. It is your feeling, though, that any cattle you recovered, if you had recovered one hundred head, you still wouldn't have deducted them, any cattle you recovered later; is that what you mean?

A. One hundred head, I might have deducted some of those, but the 62 the cost involved plus the conservative character of my original estimate, I thought I had better stand on that.

Q. In other words——

A. I am revealing it, however, in the case, and if the Court decides there is value there, I am quite sure that they would deduct it. I am not hiding anything in that respect.

Mr. Deuel: That is all.

Mr. Anthony: No further questions.

The Court: Mr. Marks, you are leaving the entire matter—not the entire matter, but the number of cattle, at least, and other livestock, as really a matter of guess-work, to a large extent to the Court? [134]

The Witness: Not exactly guess-work, your Honor. After we got the cattle out, I got hold of the foreman and we made an estimate of how many cattle were still uncollected at the various places.

The Court: The Court's guess-work comes from the basis of the value of your estimates. Now, tell me how many head of cattle did you market in the year 1941?

The Witness: I would have to look into the record for that.

The Court: Well, you haven't the records here?

(Testimony of Alfred Lester Marks.)

The Witness: Not those particular records. They were marketed at different places.

The Court: Yes, but your bookkeeping and accounting would show how many cattle you had.

The Witness: Those will show—the Bishop Trust Company had the accounting at the time, and those will show in the monthly statements.

The Court: You had something to do with the ranch there for a number of years; how many head did you dispose of in 1940?

The Witness: Up to the latter part of 1940 Mr. McCandless handled all that. Mr. McCandless passed away in October, 1940.

The Court: He had carefully kept accounts of the operations of his ranches, no doubt. In 1939 do you have any [135] idea how many head of cattle you disposed of?

The Witness: When Mr. McCandless was alive, he handled that entirely. These ranches were his playthings.

The Court: Now, in 1941 do you know how many hogs you disposed of, for market and other purposes?

The Witness: I don't believe that many of the hogs—the hogs, a few were marketed, but most of them went to luaus and donations and political luaus and church luaus, and occasionally they would send a few to market, but not very often.

The Court: How many horses did you have down there?

The Witness: I would have to check that.

(Testimony of Alfred Lester Marks.)

The Court: Well, you only lost two?

The Witness: We only lost two.

The Court: Those were the two that got killed?

The Witness: That were hit by the railroad, yes, sir.

The Court: And who fixed the market value?

The Witness: For the horses?

The Court: Yes.

The Witness: I did.

The Court: Was that fixed as a market value or as just some sentimental value in connection with these horses?

The Witness: No, \$125 is the price that one pays for a riding horse. [136]

The Court: Did you ever have any horses killed by the railroad before?

The Witness: There had been many years prior to that. There was an obligation on the part of the railroad to keep their railroad right-of-way fenced.

The Court: And these war efforts had broken down their fence as well as yours?

The Witness: Yes, they had crossed right over the railroad track in places in going from one portion of our property to another and had gone right through the fences. They took no care at all in closing the gates, and it was a constant source of annoyance, but there was nothing we could do about it.

The Court: Well, after you made every reasonable effort to drive the cattle out, did you do any-



(Testimony of Alfred Lester Marks.)

thing by way of killing for slaughter the wild ones that just wouldn't be driven out?

The Witness: No, we did not.

The Court: That escaped in the woodside hills?

The Witness: The Army had taken possession by that time.

The Court: After the Army took possession, were you excluded from coming onto the land to recover any property there?

The Witness: They immediately began using the area [137] in Makua and through there as a combat range, dropping bombs and firing with live ammunition with boats at sea.

The Court: Yes.

The Witness: And I wouldn't let the cowboys go in there. In fact, I won't let them go in now. I have no desire to have one of them blown up by stepping on a dud and assume the responsibility for it.

The Court: Well, how much time did you have to get your livestock out of there?

The Witness: The letter, as I recall, gave us about a month, but it took a longer period than that, and actually we had a longer period, due to the fact that the replacements that they were making of some of the facilities on the fee simple property were not completed in time to move over there. We were not out completely, my recollection is, until about November.

Mr. Anthony: 1942?

The Witness: 1942.

(Testimony of Alfred Lester Marks.)

The Court: Is there any trail outlet from the valley up through the forest reserve and over the ridge there?

The Witness: There was one created there, going from Makua in a northerly direction up onto Kuao-kala. It was widened and opened up as a means of exit for the troops in there in case they had used up all of their ammunition and a landing had been made in spite of their best efforts. [138]

The Court: Before the troops made any trails there, was there an ancient trail?

The Witness: There was an ancient foot trail that went up this valley that I point to. It was not—it was a dangerous trail, and I wouldn't let my family take it on horseback.

The Court: Weren't there any trails up over this——

The Witness: No, that is quite precipitous going up in back of the valley.

The Court: Or through here anywhere (indicating)?

The Witness: No.

The Court: So that the only upper outlet out of the valley went over the ridge in here somewhere?

The Witness: That is correct.

The Court: Practically every valley that I know has some outlet,——

The Witness: The most traversed trail——

The Court (Continuing): ——up the streams as far as they run, but generally over the hills and out.

(Testimony of Alfred Lester Marks.)

The Witness: There was a trail going from Keawaula going up to the Kuaokala area. I believe it is shown on this map. Yes, here it is (indicating). That was the most frequently traversed trail.

The Court: All right.

Mr. Deuel: I have another question regarding the [139] pigs. Mr. Marks, I would like to have a little more definite description of these pigs that you had there. Am I correct that they ranged all the way from new born pigs up to the sows and boars?

The Witness: I would say so, yes.

Mr. Deuel: Of that number a great number of them were small pigs, though?

The Witness; Not an undue proportion, I don't think. They were pigs of all sizes.

Mr. Deuel: Have you any idea as to what the average weight of them would be?

The Witness: Oh, I would say maybe fifty pounds.

Mr. Deuel: That is all.

Mr. Anthony: No further questions.

(Witness excused.)

Mr. Anthony: Your Honor, could we have a short recess while I telephone a witness. I expected him to be here.

The Court: Yes.

(Recess had.)

Mr. Anthony: Mr. Clarke, will you take the witness stand, please.

JOHN K. CLARKE

called as a witness on behalf of the Plaintiff, being first duly sworn, was examined and testified as follows: [140]

The Clerk: Just sit down, please.

Direct Examination

By Mr. Anthony:

Q. Your name, please.

A. John K. Clarke.

Q. Mr. Clarke, you were born in Hawaii, were you? A. I was.

Q. You are a little bit out of breath, so I will take it easy. A. I will catch it.

Q. And you have lived here all your life, have you? A. I have.

Q. Have you ever had anything to do with the ranching business, Mr. Clarke?

A. Yes, I joined a firm of Hind-Rolph and Company in 1900 and from then on I was connected with cattle ranching.

Q. You have had something to do with the Puuwaawaa Ranch on the Island of Hawaii?

A. I have.

Q. That was the ranch formerly operated by the late Senator Hind? A. That is correct.

Q. And you are one of the trustees of the estate of James Campbell? A. I am. [141]

Q. And of the estate of Bernice Pauahi Bishop?

(Testimony of John K. Clarke.)

A. I am.

Q. Those estates both have large areas of land, some of which is leased for ranching purposes?

A. That is correct.

Q. And part of your duties, both as a rancher and as an owner and trustee, have been to ascertain the rental value of ranch properties?

A. That is correct.

Q. Are you familiar with the Frank Woods' land in the Waianae District ranch?

A. Yes, the lease was held by Mr. McCandless, and lately they took over again after Mr. Woods let go of the area.

Q. Are you familiar with that land?

A. I am. I used to go hunting down there as a boy.

Q. Did you make any visits to that land after Mr. McCandless took it over?

A. After his death.

Q. After his death?           A. That's right.

Q. The Bishop Trust Company—you are an officer of the Bishop Trust Company, are you not?

A. I am.

Q. And the Bishop Trust Company was administrator of the estate of L. L. McCandless? [142]

A. That is correct.

Q. Did you make any recommendations after the death of Mr. McCandless as to ranch operations?

A. Yes, we rode over the area and I recommended that—the area at that time was in just one large block. I recommended that they cut it up



(Testimony of John K. Clarke.)

into four paddocks. That was a commencement; then see what occurred, and we would decide later if additional fencing was necessary.

Q. How many head of cattle could be carried on Leases Nos. 1740 and 1741?

A. I judge about twelve hundred acres—twelve hundred head.

Q. Do you have an opinion as to the fair rental value of that land as of 1942, July, 1942, when the leases in this case were alleged to have been cancelled?

A. I believe there would be no difficulty in leasing that land at \$3 an acre.

Q. You think that would be a fair price?

A. I do.

Mr. Anthony: No further questions.

### Cross-Examination

By Mr. Deuel:

Q. Mr. Clarke, you stated that in your opinion the carrying capacity of this area was approximately twelve hundred head of cattle. [143]

A. Yes, sir.

Q. When you stated that, did you have reference to the condition of the land before you had divided the area into paddocks or after dividing, properly broken down?

A. Well, at the time they were carrying considerable of a herd on the area when we went down there before the fencing was put in. I believe the fencing was completed, and that area would

(Testimony of John K. Clarke.)

make a nice little ranch, particularly when it is in conjunction with the other lands that the McCandlesses own. It would make a very nice little ranch.

Q. What I am getting at, Mr. Clarke, is that——

A. I get your point, yes.

Q. Your statement pertains, does it not, to the area broken down into the paddocks?

A. I believe that area would have carried a thousand head of cattle very easily prior to the fencing.

Q. Now, getting to your estimate of the rental value of that land down there, what is your basis for stating that you consider it worth \$3 an acre? Do you just pick that out of the air from your general experience, and so forth? A. No.

Q. Or are you comparing that to other leases?

A. Well, the Puuwaawaa Ranch, for instance, has an area up in Kona—and, by the way, lands on that island are not so valuable as they are on this island because of the closeness [144] to the market. We are paying \$6 an acre up there in Kona. Of course, that is developed land.

Q. That area, though, when was that lease entered into?

A. Prior to the war. We paid \$6 an acre for it, and we are making money on it.

Q. Is that Territorial owned land?

A. No, it is owned by a private individual by the name of Gouveia.

(Testimony of John K. Clarke.)

Q. You have in mind in arriving at your figure other leases of land owned by the Territory, though?

A. Well, this particular area, as I say, I am very familiar with, and we are running cattle on that. We can run as much as a head to an acre, which is very good. We are paying \$6 an acre for that. Certainly this is worth \$3 an acre.

Q. That, you stated, is privately owned land?

A. Yes, but even so, whether it is privately owned or Government owned the values are still there.

Q. You realize, do you not, that in a Territorial lease the lease is always subject to cancelation?

Mr. Anthony: I object to that. That is a question of law, what they are subject to.

The Court: Well, I think it is a fair question, to compare a Territorial lease with a privately owned lease.

The Witness: But those cancelations are only [145] because of some specific purpose. I mean, we have held Government leases for many years. Puuwaawaa Ranch is almost entirely made up of Government leases. We have held them for years and years and there has been no trouble about cancelation.

Mr. Deuel: No further questions.

Mr. Anthony: No further questions.

#### Examination

By the Court:

Q. There is considerable waste land in these two

(Testimony of John K. Clarke.)

lease-holds that are under consideration here, 1740 and 1741, is there not?

A. Not so much. It don't compare, for instance, with Puuwaawaa.

Q. There are almost inaccessible ridges?

A. Well, there are some ridges in there, but on the whole I have taken that into consideration. On the whole, I believe this \$3 an acre is a reasonable rental for it.

Q. Taking that ranch as a whole, about how many acres would it take to maintain a head of cattle year in and year out?

A. I judge somewhere between three and four acres to the animal.

Q. That would be very good pasture land, wouldn't it?

A. Yes, that can be made into very good pasture land. [146]

Q. Are you thinking of just the best of that in the Makua Valley there or are you thinking of the whole of it? A. The whole of it.

Q. How did that compare with McCandless Estate pasture land on the other side of the Waianae range? A. Honouliuli?

Q. Yes, from there on.

A. Well, some of the land at Honouliuli is better. The Kahuku lands, some of it is quite poor. They compare very well.

Q. Well, the McCandless Estate doesn't get a rental of \$3 an acre, does it?

A. No. Of course, that was put up quite some

(Testimony of John K. Clarke.)

time ago. My recollection is that Honouliuli went for \$15,000 a year. I have forgotten off-hand what the area is.

Q. Well, it is much less than \$2.50 an acre, isn't it?

A. I have forgotten what the area of that Honouliuli ranch area is.

Q. Now, are you familiar with rental prices along the slope of the Koolau Range? Quite a lot of pasture lands along there.

A. Rentals have gone up quite a bit for cattle land. Prices have gone up on beef cattle. In the old days we used to get 50 to 60 dollars a head and now we are getting over [147] a hundred dollars a head, so the rentals have naturally increased in proportion.

Q. Now, the quality of stock that you saw out there on the McCandless Ranch, what would you say as to that?

A. It showed improvement the last time I was down there. It showed improvement over what I had seen some years before.

Q. Well, some years before you had seen nothing much but longhorns?

A. Yes, that is so, but there had been an improvement in the stock. Apparently, they had gotten in some new bulls. I was really surprised at the improvement in the stock the last two visits I made down there.

Q. That is in the younger stock?

A. That's right. That's right.



(Testimony of John K. Clarke.)

Q. What kind of bulls were put in there?

A. Herefords.

The Court: All right. Thank you.

The Witness: Thank you.

(Witness excused.)

Mr. Anthony: That is our case, your Honor.

Mr. Deuel; If the Court please, at this time, pursuant to Rule 41(b), I move for dismissal of Paragraph 3 of the Complaint on the ground that the facts and law the plaintiff has shown no right to relief. And in support of [148] that motion, your Honor, we contend that the Private Law under which this suit is being brought does not encompass the paragraph as stated. I also contend that the Paragraph 3 contains no cause of action against the United States; further that the leases were in fact validly canceled and therefore there is no cause of action, that there is no compensable interest as against the United States for the occupancy of this land; and that there was acquiescence in the cancelation on the part of the McCandless Estate.

(Argument by Counsel on the Motion.)

The Court: Would this be a handy time to take a noon recess.

Mr. Anthony: Yes, it would. What time will we reconvene, your Honor.

The Court: Well, we had better save all the time we can. Half past one.

Mr. Anthony: All right.

(Thereupon, at 11:45 a recess was taken until 1:30 p.m. of the same day.) [149]

Afternoon Session 1:40 p.m.

(Argument on motion continued.)

Mr. Anthony: I move at this time for leave to amend the Complaint to add a paragraph praying for damages for the use and occupation of the leasehold premises from December 7, 1941, to December 31, 1946, by the United States Army.

The Court: 29.

Mr. Anthony: December 29, 1946, by the Armed Forces of the United States.

(Argument by Counsel.)

The Court: The motion to dismiss Paragraph 3 is denied, with right in the plaintiff to amend that paragraph if the plaintiff so elects, subject in the amendment as to the consideration of the Court.

Mr. Anthony: Very well, your Honor.

Mr. Deuel: May the record show objection on the part of the Government.

The Court: Yes, an exception to the ruling. Now from here where do we go next?

Mr. Anthony: We have completed our case.

(Recess had.)

Mr. Deuel: If the Court please, I have a man here as my first witness who has just come in from his pig farm [150] and didn't realize he should have a coat, and I should like your Honor's permission to put him on the stand.

The Court: That is all right.

The Clerk: Just take the stand here, please.

EDWARD HIROKI

called as a witness on behalf of the Defendant, being first duly sworn, was examined and testified as follows:

The Clerk; Just sit down, please.

Direct Examination

By Mr. Deuel:

Q. Will you please state your name.

A. My name is Edward Hiroki.

Q. And you reside where?

A. I live at 833 Lunalilo Road.

Q. And you were born and raised on this island,  
Mr. Hiroki? A. Yes.

Q. And what is your occupation, Mr. Hiroki?

A. Well, I am a hog raiser.

Q. What type? Hog, did you say?

A. Yes.

Q. And how long have you been in that business?  
A. Ever since the latter part of 1940.

Q. And how large a business do you have?

A. I have five acres of leased land from the Bishop [151] Estate and two acres and a half of which have been devoted to raising the hogs.

Q. Do you have very many hogs?

A. Right now I have just about 175 head of hogs.

Q. Is that about the average number you have?

(Testimony of Edward Hiroki.)

A. No, I used to have close to 350 hogs during the war.

Q. And during your experience in this business have you had experience in buying and selling hogs?

A. Yes, I did quite a bit of buying and selling the latter part of the war, that is, about 1944 and 1945.

Q. Do you have a knowledge of values of pigs, or hogs, back in 1942, particularly the first half of 1942?

A. March, according to the——

Q. I don't want you to state any values now.

A. I see.

Q. I just want to know if you have a knowledge, if you have refreshed yourself and looked up records.

A. Well, the early part of 1942 and the latter part of 1942 the reason—May I state?

Q. Yes.

A. The prices fluctuated, you see.

Q. Fluctuated?

A. Yes.

Q. What I mean, Do you, from your recollection and [152] from checking records, have a knowledge, though, of what the values were at that time?

A. Yes, I do.

Q. You stated that you were born and raised on this island, Mr. Hiroki. Are you familiar with the area of the island around toward Kaena Point, one area generally known as Makua Valley?

A. Kaena Point is just—to my memory just recently that area has been just recently occupied as a part of the piggery sights. Up until the time

(Testimony of Edward Hiroki.)

I went into the business I don't remember hardly any piggery up there.

Q. What I am meaning is, Do you know that end of the island; I mean, know what the territory is like around there, what the ground is like, what the mountains are?

A. I do to a certain extent.

Q. Know the general condition? A. Yes.

Q. You mentioned something about a University. Did you attend the University?

A. Well, I was graduated from the University of Hawaii in 1938, majoring in animal husbandry.

Q. Mr. Hiroki, I am going to ask you a fairly lengthy question. If you don't understand it, let me know.

Considering a fairly large group of pigs, we will say, which pigs ranged all the way from little babies, new born [153] pigs, up to the older ones, more or less usual numbers that might be in a group of that kind, the pigs being in an area such as the Maqua Valley, which you are familiar with, principally not being enclosed but having freedom to range throughout the valley over an area of, say, 2500, acres and free to range up into the hills, a group of pigs which were of the, we will call, domestic type by having that freedom to range, and the average weight of the pig being approximately 50 pounds, can you give us your opinion of the average value of those pigs in the first part of 1942, with the understanding that you have to go



(Testimony of Edward Hiroki.)

out and get those pigs and find them as they are on the ground, not that they are delivered to you? I don't want you to give me a figure now.

A. Yes.

Q. But do you feel you know what that value was in 1942?

A. The usual practice we employ is, Suppose a fellow wants to buy feeder pigs. They usually go to the piggery and pick whatever pigs they want, with the condition you just stipulated, acreage of 2,400 acres, and I have to go to the farm and pick up the pigs myself. Well, that is—really, we never thought of doing such a thing anyway. This is the first time I ever heard of it, and actually, probably just to get fifty or a hundred hogs you have to spend a few days to corral that amount of hogs because the vast area of pasture [154] land is actually involved, unless the pigs are confined to a certain portion of the land where you can detect the hogs right away.

Q. Can you tell me this: Supposing the pigs, the same group of pigs—I don't know whether it is a proper term—be gathered up or rounded up so you can go out there and just pick them up, can you tell us what the value would be?

A. On that basis those pigs, as you say, are domesticated animals.

Q. Assuming they are domesticated animals, but animals which have been running all over this large area.

A. In those days I used to sell them, as well

(Testimony of Edward Hiroki.)

as to buy these weaners, went up to about fifty-pounders, we used to get about \$10 apiece. That is just about the maximum price we used to get. That is the domesticated animal; you actually go the pig-gery and pick it up yourself or ask the farmer to deliver to his farm.

Q. That means you go there and you don't have to go out in the mountains?

A. No, you don't have to waste your time. The time is minimized to the point.

Q. That, you stated, would not exceed \$10. Assuming you have to go out and round up all these pigs, would that make the pig worth less to you?

A. Well, you have to consider your time, too, so [155] naturally I wouldn't pay maximum price per head, maybe should be a little cheaper than I actually paid to the farmers who keep their pigs in the pen.

Q. You wouldn't pay as much as \$10 for them?

A. No, I wouldn't.

Mr. Deuel: You may cross-examine.

### Cross-Examination

By Mr. Anthony:

Q. You say the fair price per head of a pig weighing 50 pounds was \$10 in 1942?

A. Yes, that was the price I used to get.

Q. Did you sell them for that or did you buy them for that?

(Testimony of Edward Hiroki.)

A. I sold them as well as I bought them, too.

Q. How much was pork selling for a pound at that time?

Mr. Deuel: Objection, your Honor. What pork itself was selling for is irrelevant to the question of what a pig out on the ground was worth.

The Court: Overruled.

Mr. Anthony: I am testing his knowledge as an expert.

The Witness: Well, I am not a butcher.

Q. (By Mr. Anthony): Do you know?

A. That is——

Q. Do you know? [156]

A. I do to a certain extent.

Q. Well, what is it?

A. Those days a pound of pork was not more than 30 cents a pound, I am quite sure.

Q. Do you recall all of the activity that was going on in this Territory to increase the production of pork here on this island?

A. To a certain extent I do.

Q. In 1942?

A. To a certain extent I do.

Q. Do you remember the Military Governor got out orders on slaughter houses and a lot of regulations about slaughtering? A. Yes, I do.

Q. And that was to increase the hog-raising production? A. That's right.

Q. And do you mean to say that \$10 a head for a 50-pound pig was a fair price at that time?

(Testimony of Edward Hiroki.)

A. Yes. The OPA went into effect sometime in March, 1942. The highest price we got was 22 cents a pound up to 175, to 200 pounds, that was sold.

Q. The highest price you got was?

A. Twenty-two cents a pound.

Q. That is on the hoof?

A. Yes. And a carcass was not more than 35 cents a [157] pound.

Q. The what?

A. Carcass. That is the whole carcass you buy from the pork center, not more than 35 cents a pound.

Mr. Anthony: No further questions.

### Examination

By the Court:

Q. Wouldn't there be any preference—would there be any difference in the price between pigs that were hand fed and pigs that had to find their own living off guava beans or roots, or whatever they could get, grass, and so forth?

A. As a whole, the wild pigs, the meat tastes a little smelly; therefore wild pigs usually don't go into the public market. Probably those wild pigs may go out to private use. Just eating the berries, the grasses, and all that sort of thing, that would affect the quality of the meat, and usually the butcher don't buy those types of pigs. It tastes different.

Q. The pigs that were brooded in a pen and fed

(Testimony of Edward Hiroki.)

for a little while while they were young, just tiny pigs, and then just turned loose on the range, would that be a different class of pigs than what you referred to as wild pigs?

A. Yes, that is a different class.

Q. Well, would there be any difference in the price of those pigs which were just running, you might say, wild [158] to suit themselves, and nobody fed them, they had to find their own feed after they had been weaned from their mother, would there be any difference in the price between them and stall fed pigs?

A. Am I to understand that the wild pigs you catch it and domesticate it, that is what you meant, Judge?

Q. No. Pigs that had been bred from a brood sow and a domesticated boar. A. Yes.

Q. That is, a boar that was of good stock, although he perhaps had the necessity of making his own living, but pigs that hung more or less around the land, the offspring that just ran where they would and found their own living from roots, or picked up beans, and all that, would there be any difference in the price on the market between those and stall fed pigs, pen fed pigs?

A. No difference in price provided the condition the same.

Q. They wouldn't fatten so quick on the range as they would if they were pen fed, they wouldn't get so fat?



(Testimony of Edward Hiroki.)

A. Well, in this set-up I don't think there is any difference.

Q. Do you know anything about pigs that just run at large and then occasionally get a bag of kiawe beans or something of that kind, pigs that respond to call, do you [159] know anything about hog calling? A. To some extent I do.

Q. Well, that class of pigs, are they any different in the market from pen fed pigs?

A. Well, Judge, you are talking about domesticated animals. The wild pigs will never come to your calls.

Q. How long after they have been weaned and run wild, that is, run at their own pleasure, before they would become wild, as you would class it?

A. Well, usually the pig's lifetime is between eight to twelve months, so if the pigs are unable to see the human beings for a few months, I am quite sure those pigs would be wild as can be.

Q. Pretty hard to catch?

A. Yes, that is the point.

The Court: All right.

Mr. Deuel: That is all, Mr. Hiroki.

Mr. Anthony: No further questions.

(Witness excused.)

Mr. Deuel: Would you indulge me just a second, your Honor.

I call Mr. Kanahele to the stand.

## FRANCIS H. KANAHELE

called as witness on behalf of the Defendant, being first duly sworn, was examined and testified as follows: [160]

The Clerk: Sit down, please.

## Direct Examination

By Mr. Deuel:

Q. Will you state your name, Mr. Kanahele, your full name.

A. Francis H. Kanahele.

Q. Your residence?

A. 123 Bates Street, Honolulu.

Q. And what is your present employment or occupation?

A. Public Lands Executive Officer.

Q. And you have been in that capacity for some time?

A. A little over a year.

Q. As such are you one of the custodians of the records of the Public Lands Office?

A. I am.

Q. Do you have with you, Mr. Kanahele, the file on Territorial General Lease 1740?

A. I do.

Q. And in that file do you find a letter dated January 16, 1929, from C. T. Bailey, Commissioner of Public Lands, to Mr. L. L. McCandless?

A. I have.

Q. May I ask you if this is a true copy of the one in your file?

A. It is. [161]

Q. Now, is it customary in your office, Mr.

(Testimony of Francis H. Kanahele.)

Kanahele, that letters that appear in that file have gone out through the regular course of the mails?

A. It is customary.

Q. To the party addressed thereto?

A. That's right.

Mr. Deuel: This letter pertains to a matter I was discussing earlier your Honor, the previous withdrawal of a portion of these lands from Lease 1740, and I offer it in evidence.

Mr. Anthony: We have no objection.

The Court: January 16, 1929?

The Clerk: That's right, your Honor.

Mr. Deuel: That is right, a withdrawal from this General Lease No. 1740 in 1929.

The Clerk: United States Exhibit No. 3.

(Thereupon, the document above referred to was received in evidence as United States Exhibit No. 3.)

### Cross-Examination

By Mr. Anthony:

Q. Mr. Kanahele, how long have you been in the Land Office?

A. As this capacity a little over a year.

Q. You don't know anything about this transaction then, [162] do you, of 1929? A. No.

Q. Except what you can see in the record?

A. That's right.

Q. Did you bring the record of the exchange of kulianas that was made between L. L. McCand-

(Testimony of Francis H. Kanahele.)

less and the Territory at the same time this withdrawal was agreed upon?      A. I did not.

Q. Well, would it show in that file that you have there if this was a part of a larger transaction? Would it show in that file?

A. Certain sketches of it would, but not the entire.

Mr. Anthony: May I see your file, please?

(Handed to Counsel.)

The Court: Mr. Deuel, you have how many more witnesses this afternoon?

Mr. Deuel: I have two witnesses. Dr. Willers arrived. That will take I don't think more than five minutes. And Mr. Addington, who is here from Schofield who will probably take ten or fifteen minutes. It all depends on cross-examination.

The Court: Well, I was just going to find out whether I should notify my doctor I wouldn't be there.

Mr. Anthony: I have no further questions of this witness. [163]

Mr. Deuel: Do you have any questions of the witness, your Honor?

The Court: No.

Mr. Deuel: You may be excused. I would like, before proceeding, to read this letter to your Honor.

The Court: I read it.

(Witness excused.)

Mr. Deuel: Call Dr. Willers.

ERNEST H. WILLERS

called as a witness on behalf of the Defendant, being first duly sworn, was examined and testified as follows:

The Clerk: Just sit down, please.

Direct Examination

By Mr. Deuel:

Q. Your full name, please, Dr. Willers.

A. Ernest H. Willers.

Q. And your residence?

A. 5797 Kalaniana'ole Highway.

Q. And your occupation and employment?

A. Territorial veterinarian with the Board of Agriculture and Forestry.

Q. And how long have you been in that capacity?

A. Since 1937.

Q. And in that capacity, Dr., do you, or your office, have charge of making tests of groups of cattle from time to [164] time for tuberculosis?

A. We do.

Q. Does your record show whether or not you made any tests of the McCandless cattle in 1941 and 1942, McCandless Estate?

A. Yes, we made some tests of small groups of cattle during both 1941—and, well, several groups of cattle in 1941 and one larger group in 1942.

Q. Will you please tell us what dates, starting with the 11th of March, 1941, I believe was one of your tests in 1941, and give us the number of cattle tested and the number found to be infected with tuberculosis, and go on down through 1942.



(Testimony of Ernest H. Willers.)

A. The test on March 11, 1941, shows on a test of 50 animals of which eight reacted and forty-two——

Q. When you say “reacted,” don’t you mean that shows tuberculosis?

A. That is evidence of tuberculosis by that particular test, yes.

On the 24th of March, 1941, forty-one animals were tested. One animal was found as a reactor.

On April 29, 1941, twenty-one animals were tested and no reactors were found.

On May 6, 1941, forty animals were tested and no reactors were found. [165]

On July 5, 1941, twenty-nine animals were tested; one animal was found as a reactor.

Those are all of the tests in 1941.

On April 27, of 1942, one hundred three animals were tested of which thirty-six were found as reactors. Those are all of the tests in ’42.

Q. You haven’t totaled the numbers that that would come to and the number infected?

A. I have not.

Mr. Deuel: We will let that go. That is a matter of mathematics, your Honor, which we can calculate. I have done so and will refer to it later.

You may cross-examine.

### Cross-Examination

By Mr. Anthony:

Q. Where were these cattle that you tested, the fifty, March 11, 1941?

(Testimony of Ernest H. Willers.)

A. I don't have a record of the place of testing.

Q. You don't know what valley it was?

A. No, I do not.

Q. You don't know where any of these tests were?

A. There was a mark on the test in 1942 and I do not know whether it is right or not. It is Ohikilolo. It is the only notation following any of these tests. These animals were the property of the L. L. McCandless Estate, and that is [166] all I know about it.

Q. Would it be possible that the tests made in 1941 were at Waimalu?

A. Quite possible, yes.

Q. By the way, Dr., did you make the tests yourself or did you have one of your subordinates do that?

A. I believe I made most of the tests myself, but I wouldn't be positive of all of them.

Q. Do you have any recollection of going down to Waimalu in 1941?

A. Yes, I recall that there was a feeding experiment going on down there at that time.

Q. When you use the expression "reacted" that may or may not mean that the cattle are tubercular; isn't that true?

A. Yes. We do believe that the test is quite specific, but it doesn't mean that the animals have actual visible lesions of tuberculosis.

(Testimony of Ernest H. Willers.)

Q. And an animal may have a reaction and get over it; is that correct?

A. You mean it might react on one occasion and not upon another?

Q. Yes. Is that possible or not?

A. Well, it might be possible. However, in the main an animal that is infected would continue to react on subsequent tests if the tests were not too frequent. [167]

Q. What steps do you take after you ascertain animals that have a reaction?

A. In this instance the work was being done on a voluntary basis between the owner and ourselves as the Board of Agriculture, Division of Animal Industry; we were not operating under regulation, because range animals at that time did not come within our regulation.

The practice in this particular instance was to mark the animals by slitting the ear, or other physical marking, and as the management could, they would send them to slaughter. That might take a matter of weeks until they could market them.

Q. So far as marketability is concerned, does an animal have to have lesions in order to render it non-marketable within your regulations, or what is the situation, Dr.?

A. No, the decision upon the use of the carcass for food is based upon the amount of infection that is found on examination at slaughter. It has nothing to do with the original test.

(Testimony of Ernest H. Willers.)

Q. But does it have anything to do with tubercular lesions?

A. Yes, depending upon the amount found at slaughter the decision is made whether it can be passed for food or should be condemned.

Q. Do your records show whether or not the cattle [168] that you tested had any lesions?

A. No, they do not.

Q. Would it have been noted, Dr., if that were the fact?

A. Not in this instance, no. We do on dairy cattle. That came under our regulations, but since this was a feeding project, we kept no further records on it.

Mr. Anthony: That is all.

(Witness excused.)

Mr. Deuel: Call Mr. Addington, please.

## MARTIN R. ADDINGTON

called as a witness on behalf of the Defendant, being first duly sworn, was examined and testified as follows:

The Clerk: Just sit down, please.

## Direct Examination

By Mr. Deuel:

Q. Will you please state your full name?

A. Martin R. Addington.

Q. Your residence?

A. Sunset Beach, Waialua.

Q. And your occupation?

A. Civil engineer.

Q. Pardon?

A. Department of the Army, Civil Engineers, Department of the Army.

Q. How long a time have you been with the Army? [169] A. November, 1930.

Q. And will you tell us something of your duties with them, with the Army, particularly during the early days of the war?

A. The early days of the war I first started out in Hawaii when the war first broke out.

Q. I am sorry, I can't quite hear you.

A. I say at the start of the war I was in Hawaii on the construction of the Hilo Airport. I was transferred over here to Field Area 3 in 1942, in March.

Q. You say you were in construction work?



(Testimony of Martin R. Addington.)

A. That's right.

Q. Have you had very much experience in construction work?      A. Since 1923.

Q. And does that include construction of all kinds?      A. Yes, sir.

Q. Buildings and facilities for properties, and so on?      A. That's right.

Q. You say you have had a great number of years' experience?      A. Since 1923.

Q. In connection with your work, Mr. Addington, were you familiar with the operations and what was going on during the early part of the war down at the Makua Valley on this [170] island?

A. Yes, sir.

Q. Do you know anything about any buildings—Do you know where the Ohikilolo area is, the McCandless Ranch area?      A. I do.

Q. Do you, of your own knowledge, Mr. Addington, know whether or not the Army placed any improvements and did work on the Ohikilolo property for the McCandless Estate?

A. They did, yes, sir.

Q. Do you have a list which you have prepared showing those improvements and the work done?

A. Yes, sir.

Q. And will you briefly tell the Court what those improvements were. You don't have to go into what——

A. I would like to state this, that Mr. Marks and I and his wife went down there in the early

(Testimony of Martin R. Addington.)

part of the war to his beach home there, when we were moving his furniture out and getting ready to move the ranch hands and his servants' quarters on down below to these different areas. I believe you recall that, don't you, Mr. Marks? And the Government at that time, they built some demountable buildings for his employees and for his ranch house and for his ranchers, and I have a list here. We built a 16.8 x 30 demountable for maid and husband amounting to 502.5 square feet and [171] built a 108 x 108 bathhouse for the maid and husband right by the sand dunes, Waianae way, and outside toilets. We built a 30 x 40 ranch house, bunk house, there right adjacent to his ranch house. That was a tongue and groove ranch house.

Q. In the interest of saving time, Mr. Addington, does that list you have before you—You say you prepared yourself?

A. Yes, sir, I did.

Q. And does it list the various improvements that you know that the Government placed on the McCandless property at Ohikilolo?

A. Yes, sir.

Q. Does it also list some of the work that was done on the property?

A. Yes, sir, water lines, moving tanks, pig pens and chicken runs, moving furniture up at that time on Mr. Marks' residence.

Q. Have you had in your experience a considerable amount of experience in estimating costs and valuations of construction?

A. I have.

(Testimony of Martin R. Addington.)

Q. You have also stated on this list a cost factor and your estimate of value?

A. I took the prices approximately in 1942 and 1943 to estimate this list. [172]

Q. That is when the work was done?

A. Yes, sir.

Q. What is the total valuation of your estimate there of the work which was done at Ohikilolo by the Government for the McCandless Estate?

A. \$16,587.50.

The Court: How much?

The Witness: \$16,587.50.

The Court: Actual cost?

The Witness: Yes, sir.

The Court: That is material?

The Witness: That is material and labor.

The Court: And labor. Sixteen thousand——

The Witness: \$16,587.50.

Q. (By Mr. Deuel): That work and those improvements were all on the Ohikilolo property and do not include any improvements, then, for other people, such as improvements placed on the beach for other parties? A. No, sir.

Q. I ask you if this is a true copy of the records that you prepared or if that is one that you prepared.

A. This is the one that I prepared.

The Court: Was all that new material or was some of it material from torn down structures on another part of the McCandless land? [173]

(Testimony of Martin R. Addington.)

A. Most of the houses—all of the houses and all the improvements except the water lines and chicken houses that were removed was new material.

Mr. Anthony: We object to this offer, your Honor, on the ground of relevance. This has nothing to do with Lease 1740 or 1741. This has to do with land which is owned in fee simple by the McCandless Estate.

The Court: Well, I supposed that this was introductory to some showing that these improvements were made and furnished by the Army as some sort of a compensation for damage created over on Makua.

Mr. Deuel: That is correct, your Honor. This is in the nature of a set-off in the event the McCandless Estate should be awarded damages for the use and occupancy and disturbance in their leasehold there. The Government claims that they have in turn been benefited to this amount in conjunction with that move. These buildings were placed upon the Ohikilolo property for the McCandless Estate at the request of the McCandless Estate.

Mr. Anthony: The improvements were on the land owned in fee simple.

The Court: Well, that, of course, I don't know anything about.

Mr. Anthony: I will put Mr. Marks back on the stand, but I think we are getting pretty far afield here. [174]

The Court: What the understanding was would be of importance; whether these improvements

(Testimony of Martin R. Addington.)

made by the Government far exceeded the value of those that were on the fee simple and were a compensation in part for damage done, I don't know. I think at the present time that it is proper in the record. It may be "kicked out" if it doesn't mean anything.

Mr. Deuel: I am offering this in evidence, your Honor.

The Court: All right.

The Clerk: U. S. Exhibit No. 4.

(Thereupon, the document above referred to was received in evidence as U. S. Exhibit No. 4.)

Mr. Deuel: You may cross-examine.

Mr. Anthony: No questions.

The Court: That is all.

(Witness excused.)

Mr. Deuel: If that meets with your Honor's approval, that is the witnesses we have now.

The Court: Yes. Well, I am quite glad to take an adjournment now. Tomorrow afternoon, I think I told you gentlemen a couple of days ago, I have some other matters set, but I can hear you until noon tomorrow, and if it is not inconvenient to either one of you, I will be glad to start court half an hour earlier tomorrow.

Mr. Deuel: As far as I am concerned—— [175]

Mr. Anthony: How many witnesses?

Mr. Deuel: I am afraid I have more witnesses than we can dispose of in the morning. I have possibly five more witnesses, your Honor.



The Court: Well, if they are of a general run——

Mr. Deuel: No, two of those witnesses, your Honor, have had a great deal of experience in this area and will probably be on for a considerable length of time. The third is a real estate expert here. I am sorry, I would like to accommodate the Court and be able to get through in the morning, but I feel it would be prejudicial to the interest of the Government to rush it.

The Court: Well, we will have to go over until Friday morning then.

Mr. Anthony: Will we go on tomorrow morning?

The Court: Yes.

Mr. Anthony: If we are not finished, we go on Friday morning?

The Court: Yes. Now, what time do you want to start in the morning, half past nine or ten?

Mr. Anthony: Same hour is satisfactory.

The Court: All right.

(Thereupon, at 4:05 p.m., February 15, 1950, an adjournment was taken until February 16, 1950, at 10:00 a.m.) [176]

February 16, 1950

The Clerk: A. Lester Marks and Bishop Trust Company, Limited, Executor, Administrator C.T.A., and Trustee of the Estate of L. L. McCandless, Deceased, Plaintiffs, vs. United States of America, Defendant. For further trial.

Mr. Deuel: Call Mr. Sanborn.

PERCY D. SANBORN

called as a witness on behalf of the Defendant, being first duly sworn, was examined and testified as follows:

The Clerk: Just sit down.

Direct Examination

By Mr. Deuel:

Q. Will you please state your full name.

A. Percy D. Sanborn.

Q. I would appreciate it if you would speak up a little bit louder, Mr. Sanborn. Your residence?

A. Honolulu. You want my address—Tantalus.

The Court: That is enough.

Q. And your occupation, Mr. Sanborn?

A. Assistant manager of Kahua Ranch, Limited.

Q. And how long have you been with Kahua Ranch?

A. Since August, 1936.

Q. Continually since 1936?

A. Yes.

Q. And the nature of the business? What is the nature of the business?

A. Livestock raising and wholesale.

Q. Buy, sell, and deal in livestock generally, and raise them?

A. That's right.

Q. Had you had any previous experience in the cattle business prior to working with the Kahua Ranch?

(Testimony of Percy D. Sanborn.)

A. Yes, I was born on the ranch and more or less in the business up to the time I went to Kahua.

Q. During that time did you work with cattle to any extent?

A. Yes, I did.

Q. And did you have any occasion to learn or know cattle values during that experience?

A. Somewhat, as a kid.

Q. And since you have been with Kahua Ranch, has your work there brought you into contact with cattle values?

A. Yes, it has.

Q. To any great extent? What have you done that would give you knowledge of cattle values?

A. Well, I have had authority at times to go out and buy cattle and sell cattle, and I have been managing the slaughter house for ten years, which has given me experience of beef values.

The Court: Where is Kahua Ranch?

The Witness: The main ranch is in Kohala, Hawaii. We have a slaughter house on Oahu at Honolulu. We now have some land there at Waialua.

Q. (By Mr. Deuel): Over the period of the last fourteen years, then, or since you went to work with them in 1936, you have had considerable dealings in cattle with respect to values, knowing the buying and selling prices?

A. Yes, I have.

(Testimony of Percy D. Sanborn.)

Q. And have you maintained any records in that regard?

A. Just keep records.

Q. Yes. Those you have available to you, though?

A. Yes, I do.

Q. Do you, from your knowledge and recollection and from examining the records, have knowledge of cattle values along the first half of 1942?

A. Yes, I do.

Q. Now, Mr. Sanborn—

Mr. Deuel: May I have Exhibit 1, please, the map.

The Clerk: That is Exhibit A, Joint Exhibit A.

Mr. Deuel: Exhibit A.

Q. (By Mr. Deuel): I show you a Joint Exhibit A here, which is of the northwesterly part of the island up near Kaena point. Outlined on that are two areas outlined in blue, one [179] being generally known as the Makua area and the other one as the Kuaokala, and comprising areas on which the McCandless Estate formerly operated a cattle ranch. Are you, and have you been, familiar with those areas?

A. I have never been in the Makua Valley. I have only been possibly a hundred or two hundred feet off the highway into it. Kuaokala, I have been up to the edge of the cliff, starting off from Makua and just covered a very small portion of it.

Q. But you were up on the property, though?

A. Yes.

(Testimony of Percy D. Sanborn.)

Q. And when was that?

A. I don't recall whether it was '40 or '41.

Q. In 1940 or 1941 you were up on that property?

A. Just on a small portion of it.

Q. And you have on occasion gone by the Makua area so that you could look up into it?

A. Yes, I have.

Q. And you have been on this island a number of years, of course, and know the nature of land of that kind?

A. I have a fair idea of it.

Q. On that occasion when you were up on the Kuaokala area, will you tell us what you were doing and how you happened to be there?

A. I was asked if I would like to go up with—— [180]

Q. Asked by whom?

A. By Mr. Rainy. I don't know whether he was working for the McCandless Estate at that time or not, but he invited me to go up and rope cattle with him.

Q. And what did you do up there?

A. They were up trying to get some cattle out, and I was just a helping hand.

Q. You were working up there that day?

A. I was actually a guest helping them round up the cattle that they wanted to get.

Q. You were assisting in rounding up some cattle in that area; is that right?

A. That's right.



(Testimony of Percy D. Sanborn.)

Q. Then, on that occasion did you have occasion to observe some of the cattle up there?

A. I saw one small group, yes.

Q. Only one group?

A. That is all I saw. Well, I would say I saw one group in a bunch and then I saw some scattered over the hills. I was not too close to them.

Q. Did you observe the cattle enough to know the type of cattle those were?

A. Yes, this one group; I got fairly close.

Q. What can you say with regard to what those cattle were like, based on your observation and experience in the [181] business?

A. They were strong cattle.

Q. What?

A. They were strong. They weren't what we would call ready for market. There were quite a few females in there, too, so I presume they weren't going to market, but they were strong, healthy cattle, outward appearance.

Q. Have you, in your work with the Kahua Ranch, handled any of the McCandless cattle from these ranch areas?

A. Yes, they have sent cattle to Kahua Ranch for slaughter.

Q. You have seen those catttle as they were brought in, or as the Kahua Ranch got them?

A. I saw part of them, yes, not all.

Q. Can you state whether or not those cattle were what are generally termed "scrub type" cattle?

(Testimony of Percy D. Sanborn.)

A. Well, they aren't as high a quality as you can find in the Hawaiian Islands.

Q. How would they compare, generally, with the cattle that the Kahua Ranch has?

A. I do think our cattle are a little better.

Q. Mr. Sanborn—oh, yes, from your experience with the Kahua Ranch, have you checked back with regard to cattle being brought or obtained from the McCandless Estate and brought to the Kahua Ranch for slaughter, or otherwise, and [182] do your records show whether or not there was any tuberculosis in the herd, or the ones brought in?

A. I kind of object to that question because I don't feel I have the authority to divulge records of the Company.

Q. I think you have the authority. It is being asked you in court.

A. Well, I don't want to do it without the general manager's OK and the owner's OK. That is something I am hired to do, and I don't know whether I am empowered to do it or not.

Mr. Anthony: What was the question?

Mr. Deuel: I asked him whether or not his records disclosed any evidence of tuberculosis when cattle were brought in.

Mr. Anthony: We have no objection to that. Go ahead and answer the question.

The Witness: Yes, it does. I just want to be clear. I hope you understand. I don't want to get my "neck jumped on." Yes, as manager of the slaughter

(Testimony of Percy D. Sanborn.)

house I have seen McCandless cattle condemned due to T.B. and just what percentage of the kill depends on what period of time you want to take.

Q. (By Mr. Deuel): I am talking about this period. You recall I asked you the other day if you would check back through your records for the period around 1941 and 1942. [183]

A. Yes, I did. I took from January 1, 1942 through July, I think it was, and I have a note here, if you don't mind my checking.

Q. Is that the period you are talking about you found some tuberculosis to exist? A. Yes.

Q. Now, Mr. Sanborn, I am going to ask you a question with regard to valuation of cattle.

The Court: Let's finish the other subject first. I don't get much out of generalities. He was going to get some figures; I thought he was on the point of doing that. For a given date between January 1, and what was the other date?

The Witness: July, 1942.

The Court: Have you the figures? How many?

The Witness: This may be subject to correction, but in my adding up the figures it came to 204 head of cattle slaughtered.

The Court: Yes.

The Witness: And sixteen, as far as my records show, now subject to correction, sixteen head were condemned because of T.B.

The Court: How does that compare with your own cattle and other cattle that you slaughtered?

(Testimony of Percy D. Sanborn.)

The Witness: Basing it against Kahua, I don't know of [184] any off-hand of our own raise that have ever been condemned for T.B. That is, during the period that I have worked for Kahua.

The Court: How about others that you buy for slaughter?

The Witness: The rate is very low, generally speaking. It would be a fraction of a per cent.

The Court: All right.

Q. (By Mr. Deuel): Did I understand you to say, Mr. Sanborn, that from a little over 200 head of cattle that there were sixteen that were condemned?

A. That's right.

Q. That then roughly figures close to 8 per cent?

A. Close to 8.

Q. And now, Mr. Sanborn, based upon your experience in this field any your knowledge of cattle values, relating back to early 1942, assuming that you take a herd of cattle that are of the scrub type, considerably inbred, some tuberculosis existing in the herd, many of the cattle being quite wild, they being scattered, or ranging over a fairly large area of land, such as the area that you are familiar there with, the Kuaokala and the Makua areas, and also many of them up into the forest reserve areas, can you give us what your estimate of the fair value, on the average, of those cattle would have been to a purchaser who had to go in [185] and take them on the hoof, so to speak, or on the ground as they existed there, not being brought up into a corral.

(Testimony of Percy D. Sanborn.)

Mr. Anthony: I object to the question on the ground that it is incomplete, your Honor. The testimony is to the effect that the breed had been improved by introduction of purebreds. In fact, Mr. Clarke testified to that. There is nothing about "inbred" in the evidence.

Mr. Deuel: I am asking a hypothetical question here, your Honor, and I will agree with Counsel that as the evidence stands at present there is nothing about inbreeding. However, I submit the question is proper because I am going to bring that evidence in to substantiate it. I am putting Mr. Sanborn on now because he wants to get back out to his operations.

The Court: Well, until you bring the inbreeding in, I think it is improper.

Mr. Deuel: This is merely a hypothetical question.

The Court: I know, but there is no evidence in now as to inbreeding.

Mr. Deuel: May I have permission of the Court to put on another witness just a minute on that one point, and then recall Mr. Sanborn?

The Court: All right.

Mr. Deuel: Would you step aside just a minute.

(Witness temporarily excused.) [186]

Mr. Deuel: Mr. Rodrigues, will you take the stand, please.



## MANUEL RODRIGUES

called as a witness on behalf of the Defendant, being first duly sworn, was examined and testified as follows:

The Clerk: Just sit down, please.

## Direct Examination

By Mr. Deuel:

Q. Will you please state your full name.

A. Manuel Rodrigues.

Q. Can you talk up just a little bit so your voice will carry. And where do you live, Mr. Rodrigues?

A. Wahiawa, 2059 Hill Drive.

Q. And what has been your occupation, Mr. Rodrigues?

A. Well, I was a jack of all trade. I was with the McCandless part of the time, four years, with different bosses.

Q. Have you had experience in the cattle business?

A. Yes, I have.

Q. Working with cattle?

A. Yes, I have.

Q. And you state that you have worked on the McCandless Ranch?

A. Yes.

Q. When did you work on the McCandless Ranch? When I [187] speak of the McCandless Ranch, I am talking about the one at Makua and Kuaokala areas.

A. I worked there in 1929. I stayed there for two years and I left them because the bosses gets on a drunk all the time, so I have to work 24 to 48 hours, so it is too much for me, so I left. So I

(Testimony of Manuel Rodrigues.)

went out and then I went back again. Then I worked for John Pico, the second foreman, and then I quit because they was tracing us all the time. They think we are a bunch of thieves around there, so we can't go nowheres without they are right behind our heels, so I left them. Then Sebastian Rainy——

Mr. Anthony: I can't hear a thing this witness is saying, your Honor. May we have that statement.

The Court: About the bunch of thieves?

Mr. Anthony: The McCandlesses accusing.

The Court: Say it over again.

The Witness: John Pico accused us, not McCandless or not Mr. Marks.

(Answer read.)

Mr. Deuel: We will appreciate it if you will talk louder so everybody can hear you, Mr. Rodrigues. Will you go ahead.

A. (Continuing): So I worked under Sebastian Rainy.

Q. (By Mr. Deuel): When?

A. Well, during the blitz, or right before the blitz. [188]

Q. That is 1941? A. Yes.

Q. And then did you continue working there for a while?

A. Yes, I continued there for a while.

Q. After December 7? A. Yes.

Q. During that time were you familiar with the cattle on the ranch area?

A. I was still familiar with cattle, yes.

(Testimony of Manuel Rodrigues.)

Q. You observed them all the time there?

A. Yes.

Q. And from your observation and your past experience with cattle——

A. Yes, sir.

Q. (Continuing): ——that is, your observation of this particular herd and past experience with cattle, can you tell whether or not this herd was or was not inbred?

A. Well, most of the cattle there, they are all inbred.

Q. To any great extent?

A. So those cattle, they are very poor because the land is too dirty where it hasn't got much feed all around.

Q. The only point I want to get at right at the moment, Mr. Rodrigues, is how much inbreeding you would say there was in that herd. Was it just a small amount or quite a lot.

A. The whole thing only a few bulls, big animals; I [189] don't know what kind of a breed they are, but the cows and their calves, they were very poor.

Mr. Anthony: May I have that answer.

(Answer read.)

Q. (By Mr. Deuel): You are speaking now as of the time 1941 and early 1942; is that right?

A. Yes.

Mr. Deuel: If the Court please, I intend to go into other matters later with this witness, but I just wanted to get this evidence in so I could proceed with Mr. Sanborn, if I may recall him.

(Testimony of Manuel Rodrigues.)

The Court: All right. Did the bulls run with the herd?

The Witness: Yes, all open. They all run together.

The Court: How many bulls did they have?

The Witness: Well, all told McCandless have about 28 bulls in Makua Valley, all breeds, some white face and some bally ankle.

The Court: What do you mean by "inbred"?

The Witness: Well, small cattle because their sons mixed up with sisters and mothers, and that is what we call inbred cattle. No separate bull that comes in there every six months or a year and the same bull over and over until they drop dead.

The Court: The bull or the offspring? [190]

The Witness: McCandless is a man, he don't want you to tell him anything of those kind to take them out.

### Cross-Examination

By Mr. Anthony:

Q. What were you, a part-time employee with McCandless?

A. Well, I get mad when he works with the bosses that they don't treat me right.

Q. Wait a minute. Will you listen to my questions. I asked you if you were a part-time employee.

A. Yes.

Q. You didn't work there full time?

A. Well, I worked there for four years, but part time because that is where I walked out because—

(Testimony of Manuel Rodrigues.)

The Court: What time are you talking about, his whole life or what?

Q. (By Mr. Anthony): When did you quit working for the McCandless Ranch?

A. That I didn't take the date when I quit.

Q. What year?

A. '32 I quit there.

Q. That is because you got "huhu" at the boss?

A. Yes. He get on a drunk; I have to work. I figure the animal—because it hasn't got any water, they cry all night around the ranch so a man can't sleep, so I had to go pump water at night. [191]

Q. 1932; is that right? A. Yes.

Q. And where did you go to work in 1932? What did you do in 1932 after you quit?

A. I came back to my home.

Q. To Honolulu?

A. No, in Wahiawa.

Q. Wahiawa? A. Yes.

Q. And how many years did you stay in Wahiawa? A. I living there twenty-four years.

Q. You have lived at Wahiawa since 1932?

A. 1928 I live in Wahiawa until today, so I goes to work here and there, and when I got through I go home.

Q. Well, let's see if I can get this straight. You quit the McCandless Ranch in 1932? A. Yes.

Q. Is that right? A. Yes, sir.

Q. And you left Waianae and you went to Wahiawa? A. Yes.



(Testimony of Manuel Rodrigues.)

Q. And you stayed there down to the present time; is that right?      A. Yes.

Q. And what did you do for a living since you left the Waianae district? [192]

A. I would work for City and County.

Q. What job?      A. Road Department.

Q. You have been there continuously?

A. Yes.

Q. You are working for the City and County now?

A. Not now. I am a retired officer from the Territory. I was a ranger for the Territory, so I am retired now.

Q. But from 1932 down to date you haven't worked for the McCandless Ranch; is that it?

A. Well, when I left there, I didn't work till the old man came and get me to go to work. I was working part time for him at Schofield Road Department under contract, and then I get through there and I move to Hauula under McCandless contract, Road Department.

Q. Was Linc putting up a road there in Schofield?

A. Yes, Government road, Federal Government road.

Q. Did Mr. McCandless have a job at Wahiawa?

A. No, in Schofield.

Q. Well, now, after Linc died—do you remember when the old man died?      A. Yes, sir.

Q. Do you know whether or not any new bulls were brought in?

(Testimony of Manuel Rodrigues.)

A. No, not when McCandless died, I haven't seen any. [193]

Q. You don't know anything about that?

A. No.

Q. You wouldn't know whether new stock was brought in or not?

A. No, the only stock was brought from wild stock from Hawaii, Kona, that is, McCandless; that is all that was brought there.

Q. Well, is it accurate to say that what you testified to is based upon what you learned in 1932; is that right? A. Yes.

Q. What you knew about it? A. Yes.

Mr. Anthony: That is all.

### Redirect Examination

By Mr. Deuel:

Q. Mr. Rodrigues—— A. Yes.

Q. I want to clarify this. Mr. Anthony has intimated that you were not familiar with the cattle out there after 1932. Will you again tell us whether or not you were actually familiar with those cattle later than 1932.

A. Later, yes. I went back there. I was familiar.

Q. You were on the ranch?

A. On the ranch.

Q. In 1941 and 1942? [194]

A. Yes, sir.

Q. And you observed the cattle at that time?

A. Yes, sir.

Q. And from your observation of those cattle

(Testimony of Manuel Rodrigues.)

at that time, at the time the war broke out, do you know whether or not the herd as a whole was of cattle which were inbred?

A. Yes, I do. They were all inbred.

Q. They were highly inbred?           A. Yes.

Mr. Deuel: That is all.

### Recross-Examination

By Mr. Anthony:

Q. You went out there as a visitor; is that right?

A. No, sir, I was working for McCandless at the time under Sebastian Rainy.

Q. I mean after you left in 1932.

A. After I left there, I went away and then when I got through with McCandless, I went to work for City and County. I went right back to Makua again, under McCandless' invitation. I went to work for him.

Q. Then you returned to the ranch?

A. Yes, I returned.

Q. After 1932; is that right?           A. Yes.

Q. And what year was that that you went back?

A. That I don't remember.

Q. Was it in 1941?

A. Well, that is the third time I went back. I went back in 1932 and I worked back under Sebastian Rainy.

Q. How long did you stay there the last time?

A. I stayed there till after the blitz for a little while; then I left there. I got hurt.

(Testimony of Manuel Rodrigues.)

Q. Were you on the pay roll at the time of the blitz?  
A. Yes.

Q. Full time?  
A. Full time.

Q. Now, do you know whether or not any new bulls had been brought in?

A. No, not at all.

Q. Well, do you mean that none were brought in or you don't know?

A. I have been there all that time, I haven't seen any come. If they do come, either they haul it by rails or by truck. I haven't seen any.

Mr. Anthony: No further questions.

Mr. Deuel: That is all, Mr. Rodrigues.

(Witness excused.)

Mr. Deuel: Will you take the stand again.

### PERCY D. SANBORN

resumed the stand and testified further as follows: [196]

Mr. Deuel: Your Honor, I submit that we now have evidence of inbreeding and that my question is proper.

The Court: All right.

### Direct Examination

(Continued)

By Mr. Deuel:

Q. Do you still have in mind the question that I asked you, Mr. Sanborn, just before the objection?  
A. No, I would like to have it repeated.

(Testimony of Percy D. Sanborn.)

Mr. Deuel: Would you reread that question.

The Reporter (Reading): "Q. And now, Mr. Sanborn, based upon your experience in this field and your knowledge of cattle values, relating back to early 1942, assuming that you take a herd of cattle that are of the scrub type, considerably inbred, some tuberculosis existing in the herd, many of the cattle being quite wild, they being scattered, or ranging over a fairly large area of land, such as the area that you are familiar there with, the Kuaokala and the Makua areas, and also many of them up into the forest reserve areas, can you give us what your estimate of the fair value, on the average, of those cattle would have been to a purchaser who had to go in and take them on the hoof, so to speak, or on the ground as they existed there, not being brought up into a corral."

The Witness: Do you want a dollar-and-cent answer [197] to that?

Q. (By Mr. Deuel): You have that knowledge, first?

A. Based on beef and the fact that I were going to buy them fat, I would offer \$45 a head under the question asked.

Q. I didn't quite get your answer. You say that you would——

A. I would, in buying, assuming the cattle are what they are described in the question, I would offer \$45 per head, because I would be buying them as feeder cattle.

Q. Now——



(Testimony of Percy D. Sanborn.)

The Court: You would offer that for them on the range, and you recover them?

The Witness: Yes.

Q. (By Mr. Deuel): So that it, you consider, would be a fair value, as the question was put to you, in 1942 for that type of cattle?

A. I would be willing to offer that, as the question was, assuming there was some tubercular.

Q. Yes.

A. Under that circumstance I would have been willing to have paid \$45 a head.

Q. What I am wanting to know, is that what you would consider to be a fair value for those cattle in that condition at that time? [198]

A. Yes. That, naturally, based on the fact that you have a normal herd, cows, calves, bulls.

Q. Just take an average?

A. Yes, average cattle range.

Mr. Deuel: You may cross-examine.

### Cross-Examination

By Mr. Anthony:

Q. Mr. Sanborn, what would you estimate would be the cost of catching cattle that have been dispersed over an area such as this?

A. Rather hard to estimate that, but I would contract it to different fellows who probably were familiar with the area at \$10 a head delivered into the corrals.

Q. That is a fair and reasonable price for the

(Testimony of Percy D. Sanborn.)

catching of cattle that have been dispersed over an area of 4,700 acres such as this?

A. At that time I would have been willing to have offered anyone—they supply all their own equipment; I will take the cattle in the corrals alive.

Q. Now, Mr. Sanborn, what was the condition of the market in regard to the purchase and sale of cattle on the hoof in July of 1942, or in the early part of 1942? A. Very strong.

Q. There were plenty of people, were there not, butchers and others, who were willing to go right out and buy a steer [199] or a calf right on the hoof; isn't that right? A. That is correct.

Q. No difficulty of disposing of them?

A. No, no trouble on that.

Q. How about these restaurants? Would they buy cattle in that condition, on the hoof?

A. They would buy where there was—during that first six months there was an awful lot of buying by all types of people.

The Court: Well, what do you mean "on the hoof"? That doesn't convey to me very much information. Cattle generally are on the hoof while they are alive. Do you mean on the range or in a corral?

Q. (By Mr. Anthony): You would have to get them in a corral, wouldn't you, to sell them to a butcher or restaurant keeper; is that right?

A. Yes.

Q. Now, would some of those people fatten up the cattle after they got them?

(Testimony of Percy D. Sanborn.)

A. No, they wanted them slaughtered immediately.

Q. Slaughtered right away; is that right?

A. That was my experience with these buyers.

Q. During this period what do you estimate the fair market value of the Kahua cattle to be per head?

A. What would I have estimated them?

Q. Yes. You said these are worth \$45 a head; what would the Kahua cattle be worth?

A. I wouldn't have sold—if I had had the authority I wouldn't have sold the whole Kahua herd for less than \$75 apiece.

Q. How much?

A. \$75 apiece. I wouldn't have taken anything less, if I had the authority.

Q. How much did Kahua get for them?

A. Well, you have a pencil, 500-pound average times an average price of about 22 cents. About \$110. That is based on what we normally would kill in a year's time during that period of time, I mean cows, bulls and steers and heifers. We generally would average out about a heifer price.

Q. Was that the going price of beef the first part of 1942, twenty-two cents a pound?

A. That was the price of heifers.

Q. Twenty-two cents?

A. For heifers, yes. Steers were a half cent higher. That was all Government controlled price.

Q. There wasn't any OPA in 1942, was there?

A. Well, it was the office of some administration.

(Testimony of Percy D. Sanborn.)

Q. It was the generals over here; did they fix the price of beef at wholesale?

A. The Government did. I don't recall which agency [201] it was, but there was Government control.

Q. Are you sure of that, Mr. Sanborn? I think you are mistaken; that is why I asked you. Didn't the OPA come in later?

A. I am not sure. I would have to go back over my records, but we had Government control, whether it was Territorial, Military Governor, or Uncle Sam.

Q. I am talking about the first six months of 1942. Do you think you had Government control then?

A. We had some sort of Government control.

Q. And there wasn't any great amount of beef imported during that period, was there?

A. Not to my knowledge there was not.

Q. Any cattle imported into Hawaii?

A. I wouldn't know.

Q. Well, what is your best information on that? You are a cattle man. Were there cattle being brought into these islands the first six months of 1942?

A. I really don't know.

Q. Well, you know the shipping situation, don't you?

A. Yes, I realize that, and I assume there weren't any the first six months of the war. I was too busy otherwise to keep track of that.

Q. Mr. Sanborn, the small buyer and restaurant keeper that was in the market trying to get beef in

(Testimony of Percy D. Sanborn.)

the early part of 1942, do you think that he would have paid a higher price [202] than \$45 a head for these cattle in a corral on the hoof?

Mr. Deuel: Objection to that question, your Honor. His statement regarding \$5 was not in the corral; it was if the cattle were scattered all over the ranch, and Mr. Anthony is suggesting now that the \$45 he has talked about is in the corral. We are getting at two different things.

Mr. Anthony: The difficulty with that evidence, your Honor, is they are trying to charge us for having destroyed the fences. It was because of the activities of the Army that they were scattered all over. That is not our fault. We had an operating ranch until the Army cut it all to pieces.

Mr. Deuel: There has been no evidence that cattle were in corrals, your Honor. I believe the evidence is that cattle were ranging throughout the area. The evidence is very clear that they had access up into the Kuaokala area because there was no fence along the borderline.

Mr. Anthony: The evidence is the Army destroyed the paddocks and the corrals.

The Court: I don't think any answer the witness could give to that question would be very informative to me. Restaurants and people of that kind wouldn't buy a flock of cattle. It isn't likely that they would, unless they had some place to keep it.

Mr. Anthony: I think that is correct, your Honor. [203]



(Testimony of Percy D. Sanborn.)

The Court: From any beef cattle in a corral they would want to pick out just the particular ones that they wanted. Taking the cattle as a whole, from calves to heifers, to brood cows and bulls and steers, and what not, what some restaurant would pay for some head of stock in the corral wouldn't mean anything to me in fixing any value.

Mr. Anthony: I will withdraw the question, your Honor.

Q. (By Mr. Anthony): Mr. Sanborn, the sixteen cattle that you found tubercular—I believe you said there were 16 out of 204; is that correct?

A. That is what I said.

Q. Do you know where those came from; I mean, what part of the McCandless Ranch they came from?

A. No, I don't. Sometimes they would tell me what section they were from and other times they said, "We have a load of cattle," and they would bring them in.

Q. You wouldn't know whether or not——

Mr. Anthony: Withdraw that.

Q. (By Mr. Anthony): Did you know about the experiments that the McCandless Ranch was conducting at Waimalu, feeding up of scrub cattle?

A. Yes, I do.

Q. Do you know whether or not any of this 204 that were slaughtered during the period that you testified about came [204] from Waimalu?

A. I don't think they did. I would like to check my records, But as I recall——

(Testimony of Percy D. Sanborn.)

Q. Can you do that now? Or, you don't have that available?

A. I don't have my books with me.

Q. I see.

A. I think they came in before the blitz. I recall going through my records yesterday and noticing we had killed some, and I think they were prior to that date.

Q. Well, this 204 were between January 1 and July, is that right, of 1941?

A. Including July.

Q. 1941? A. No, 1942.

Q. 1942? A. Oh, I see.

Q. What was it you said came in before the blitz, Mr. Sanborn?

A. You asked me about the experiment conducted at Waimalu and about the cattle that were slaughtered from that experiment.

Q. Yes. You think that was done before the blitz?

A. As I recall, they did. I wouldn't want to be held to that specifically. [205]

Mr. Anthony: No further questions.

### Redirect Examination

By Mr. Deuel:

Q. Mr. Sanborn, Mr. Anthony asked you about what you would consider at that time the average value of your Kahua cattle, and you stated it would be \$75. When you were talking about that, you

(Testimony of Percy D. Sanborn.)

were speaking of your cattle in the corral; is that correct?

A. Yes, and based upon the fact that we had to liquidate and we were selling them, not as any breeding stock, but just as beef cattle, as if they were all going to market.

Q. The whole herd as a whole?

A. That's right. But I am putting myself in the same position if somebody asked me to buy a bunch of cattle and I had my own ranch, I wasn't interested in breeding any of them, I just wanted to buy them on the basis that I would make some money by killing them, and only on that basis would I have considered Kahua cattle at that price. Otherwise, I would naturally have asked an awful lot more.

Mr. Deuel: That is all.

### Recross-Examination

By Mr. Anthony:

Q. In other words, you are talking about having to sell them all in one "fell swoop"; is that right?

A. That's right. [206]

Q. What would your price be, what would your figure be, if there were an orderly marketing of those cattle over a period of years.

Mr. Deuel: If the Court please, I don't believe that question gets to our question here. What we are interested in is what the value is of the herd as a whole, which is assuming an over-all sale of the

(Testimony of Percy D. Sanborn.)

whole herd, not the marketing of them piecemeal, or a few at a time. I object to the question on that ground.

The Court: Well, you opened the way there.

Mr. Anthony: That is not just compensation for sale.

The Court: Go ahead.

Mr. Anthony: Did you get the question, Mr. Sanborn?

The Witness: In other words, as we are now marketing in normal procedure of marketing?

Mr. Anthony: Yes. You stated at the end of your redirect examination to Mr. Deuel that the reason you put \$75 a head was that all you were going to use them for was to kill them and sell them; if you were going to market them or use them in the ordinary, normal course of business, if you were the owner, you would ask for a great deal more, as I understood your testimony.

Mr. Deuel: Your Honor, it is understood that this answer must relate to value in the early part of 1942, the time we are talking about. He is talking about marketing them [207] over a period of time which would run on for several years, and if prices varied at a later date, that would put a different complexion on the matter.

Q. (By Mr. Anthony): Do you understand my question?      A. Yes.

Q. What would your answer be?

A. Just to verify that \$75 figure I put on.

Q. I can't hear you.

(Testimony of Percy D. Sanborn.)

A. To verify the \$75 under liquidating the whole herd.

Mr. Anthony: I don't get that first word.

(Answer read.)

The Witness: To verify the \$75 which I answered to Mr. Deuel, was on the basis of liquidating the herd, everything.

Q. (By Mr. Anthony): In other words, for sale in one "fell swoop"?

A. That's right. Under our normal marketing conditions Kahua has averaged 500 pounds, everything slaughtered, and I believe in 1942 that we still averaged 500 pounds, cows, all sexes, slaughtered under our market procedure, and I would judge, not having actually calculated out or gone back over any annual reports, I used to find that the heifer price was generally about the average price we got, average price per pound, so approximately \$110 is what we would have received for approximately about 1,200, 1,500 head of cattle.

The Court: Are you thinking now about the cattle [208] that you raise on Hawaii or the cattle you raise out here on Oahu.

The Witness: Well, it would include any and all cattle that we raised ourselves, whether we fatten them on Oahu or whether we fatten them on the main ranch.

Q. (By Mr. Anthony): Your main ranch is the old Frank Woods Ranch at Kohala; is that right?

A. Yes.



(Testimony of Percy D. Sanborn.)

Q. And you have fattening pastures down here on Oahu?      A. Yes, we do.

Q. When you answered your hypothetical question of a herd wandering on an open range of some 4,700 acres, and, in response to Mr. Deuel's hypothetical question, you valued the herd at \$5 per head, that was again upon the assumption that there was a forced sale all at one time, is that right, just like you said that the Kahua was \$75; is that right?

A. Well, I would assume that the party was eager to sell his cattle if he came and asked me to buy his herd. Whether it would be a forced sale or not, I wouldn't know. I would assume he wanted to liquidate his herd and was trying to shop around and get a price. My offer would be such-and-such, because if I really knew he was being forced out of business, or something, I may "play smart" and start at \$10, and we would probably end up compromising. I am taking an assumption that the man wants to get rid of his cattle. He [209] may have some other plans for his land, I don't know.

Mr. Anthony: No further questions.

Mr. Deuel: No further questions. That is all, Mr. Sanborn.

(Witness excused.)

Mr. Deuel: Mr. Korte.

KARL HENRY KORTE

called as a witness on behalf of the Defendant, being first duly sworn, was examined and testified as follows:

The Clerk: Just sit down, please.

Direct Examination

By Mr. Deuel:

Q. Mr. Korte, will you please state your full name? A. Karl Henry Korte.

Q. And your residence and occupation.

A. I live at 3033 Oahu Avenue, Honolulu, and I am a forester by profession.

Q. And for whom do you work, Mr. Korte?

A. Territory of Hawaii Board of Agriculture and Forestry.

Q. And have you been with the Board of Agriculture and Forestry as a forest ranger for some time?

A. I was an assistant forester for nine years. I never was a forest ranger. There is a difference in grade.

Q. You have been working in the forest areas though? [210]

A. It will be nine years the first of March.

Q. What would that be when you started, what date? A. March 1, 1941.

Q. March 1, 1941. Do your duties take you out into the forest areas for inspection and so forth?

A. That's right.

Q. After you started with them in March of

(Testimony of Karl Henry Korte.)

1941, did your duties take you out into the areas which are shown in blue on the exhibit here before you, which are out in the McCandless Ranch areas, in the Makua and Kuaokala area?

A. That's right.

Q. And how frequently would you go into those various——

A. Approximately once a month. Up to the time of the blitz I was there as least eleven times, from March to the blitz.

Q. And were you there any after the blitz?

A. I was there once after the blitz.

Q. And during that time did you make inspections of the area?           A. That's right.

Q. Particularly of the forest area?

A. That's right.

Q. Going to the Makua area, and the part within the lease area, which is outlined in blue, then toward the mountains from that and surrounding it is the Makua Forest area? [211]

A. That's right.

Q. Can you state whether or not you inspected the fences that were along the boundary, forest boundary area, separating it from the lease areas?

A. That's right.

Q. And will you state what you found to be the condition of that fence.           A. What fence?

Q. The fence between the Makua Ranch and Makua Forest Reserve area. Will you state what the condition of that fence was, as you found it.

A. The fence was in very poor condition. There

(Testimony of Karl Henry Korte.)

was never, practically, any maintenance work done as far as nailing up new wires, replacing old posts. The gates were in poor condition. Sometimes they were left open. The cattle were ranging in and out between the forest land and the ranch land.

Q. Both through the gates and through the fence itself?

A. Yes. The main gate was open on the 11th—I mean on the 28th of November, 1941. That gate was open, wide open, and cattle were ranging back and forth.

Q. What I am getting at, in addition to the gates whether or not the fence in general was in a stock proof condition.

A. No, it was not in a stock proof condition.

Q. Would you say that condition existed right on up to the time of the war?      A. That's right.

Q. At times you were out there, Mr. Sanborn, did you—You state that the 28th of November cattle were ranging through the fence there; did you find cattle ranging around in that Makua Forest area?      A. Yes.

Q. How extensive was that?

A. Well, they ranged all over the area. They even went up to the palis on these nose ridges, up to the edge of the tree ground. I found one—not one, but several head of cattle, they must have been at least 400 feet above the bottom of the valley up on these noses. They ranged all over.

Q. That condition had existed, you say, ever since March when you first went out there?

(Testimony of Karl Henry Korte.)

A. That's right.

Q. Did you ever take this matter up with representatives of the McCandless Estate?

A. Yes, I talked to who I presume was the foreman and told him the cattle was in there and if they couldn't make an effort to get them out, but to my knowledge no effort was ever made.

Q. Did you, in looking around there and inspecting that and seeing the cattle, have a chance to observe the nature [213] of the cattle; I mean, type of cattle? Were they domestic, wild cattle among them, or what?

A. In my estimation they were rather wild. Every time you came near them or disturbed the bunch, they took off.

Q. Now, getting to the other area there, up on the Kuaokala area, did you also inspect the forest reserve area there and the boundaries of the area?

A. Yes, I did.

Q. Will you tell what the condition was, whether or not between the area labeled here Lease No. 1741 and this Kuaokala Forest Reserve area there was a fence existing?

A. There was no fence—there was a fence here, but there never was any fence, to my knowledge, on the Kuaokala Forest Reserve.

Q. For the record, you are pointing out that there was no fence between the area labeled Lease 1741 on this map and the Kuaokala Forest Reserve?

A. Yes.



(Testimony of Karl Henry Korte.)

Q. And did you find cattle ranging in that forest reserve area? A. Yes.

Q. And you are speaking of this same period of time? A. Yes.

Q. And were those cattle the same type you found in the Makua area? [214]

A. To me they looked about the same type.

Q. I want to ask you another question with regard to the map here. This fence that you pointed out as being on the boundary between the Kuaokala Forest Reserve and what is labeled the Mokuleia Forest Reserve, do you know who that fence belonged to?

A. I am not positive whose it was, who built that or whose it was. That was before my time. I know there was a fence here (indicating).

Q. You wouldn't know the owner of those fences? A. No.

Mr. Deuel: You may cross-examine.

### Cross-Examination

By Mr. Anthony:

Q. When were you out there last?

A. The last time I was out there was in March of 1942.

Q. When did you join the service?

A. March 1, 1941.

Q. And when did you go out there in 1941?

A. May I refer to notes?

Q. Yes.

A. We keep a work diary, what we did every

(Testimony of Karl Henry Korte.)

day, in a working day. Which area are we talking about now, the Makua area?

Q. Yes, the area you are talking about; when did you [215] first go out there?

A. Makua Valley I went on the 18th of March, 1941.

Q. Anybody else with you? A. No, sir.

Q. March 18? A. 1941.

Q. When did you go out in that district again, McCandless property?

A. I went on April 25, 1941.

Q. April 25? A. 1941.

Q. Yes.

A. I reported that there were cattle in the forest to the McCandless Ranch at that time.

Q. That was at Makua? You went to Makua?

A. Yes.

Q. All right. What was the next visit?

A. Then on May 11, 1941, I again talked to I presumed was the foreman.

Q. Where did you go on May 11, 1941?

A. Beg pardon?

Q. Where did you go?

A. Up into the forest area.

Q. What lands? A. In Makua Valley.

Q. And when did you go out again?

A. And I made another inspection on the 2nd of May, 1941, the 19th of June, the twenty—I believe this is the 22nd of June, the 22nd of July, the 11th of July, the 22nd and 27th of August, the 4th

(Testimony of Karl Henry Korte.)

of August, the 11—I mean the 28th of November, and the 2nd of March, 1942.

Q. Wait a minute. The last one was the 28th of November? A. Yes.

Q. The last one in 1941?

A. And the 2nd of March, 1942.

Q. Now, these dates that you have given us are all with respect to visits that you made to the McCandless ranches in the Waianae District?

A. Only the forest reserve. I mean on those dates I was in the forest reserves.

Q. You understand what we are talking about here? A. Yes.

Q. The boundary of the McCandless lands.

A. Yes, between the McCandless land and the forest boundary.

Q. Yes. A. Yes.

Q. I don't care whether you were in the forest. We want to know whether or not you were along the boundary of the McCandless land and the forest reserve. [217] A. Yes, I was.

Q. Is that where you were? A. Yes.

Q. Do you know Mr. Max F. Landgraft?

A. Yes.

Q. Who is he?

A. He is associate forester on this island and the Territory.

Q. Is he one of your subordinates?

A. No, he is my superior.

Q. Did he ever go out there?

(Testimony of Karl Henry Korte.)

A. I think he went with me one time. I don't know what date that was.

Q. Have you had occasion to examine the records in the files of the Board of Agriculture before testifying?

A. My own records, my own diary.

Q. And you say you were there on—were you there on March 11?

A. No, I didn't say March 11.

Q. I am asking you if you were there. You said you were up on March 18.

A. That's right.

The Court: You said you were there on March 11, 1942.

The Witness: That was March 2, 1942. [218]

The Court: Yes.

Q. (By Mr. Anthony): Would you say that the Mokuleia Forest Reserve fence was in excellent condition on March 11, 1941?

A. Which part of the fence do you mean, the one across Kuaokala?

Q. Well, you examine that map there.

A. Yes. Do you mean—You see, there is a fence completely around. There is a fence.

Q. Where that joins the McCandless land.

A. That is right here (indicating). Yes, that fence was in fairly good condition.

Q. And how about the rest of this fence over here (indicating)? You said this was where it was broken down. Where did you say the fence was not in good condition?

A. It is up in this section here (indicating), I

(Testimony of Karl Henry Korte.)

believe it was. You could drive up this road part ways, then walk. It is this section (indicating) I am talking about.

Q. And what was the condition of the fence there?

A. It was in poor shape. It needed a lot of maintenance work. Wires were loose. I don't mean the fence was completely down, but wires were loose and quite a number of the posts were decayed.

Q. When was that?

A. All during my inspection trip. [219]

Q. Well, I mean was there no work done at all?

A. Not to my knowledge. There might be occasionally a wire nailed on, but to my knowledge there never was a real maintenance job done.

Q. Are you a trained forester?

A. Yes, sir.

Q. Where did you receive your training?

A. Louisiana State University.

Q. What did you do before you joined the department?

A. I was in the CCC's.

Q. Here on this island?

A. No, on the island of Hawaii.

Q. As a forester?

A. As a foreman and as a project superintendent.

Q. Did you see any work going on there, cutting the Makua Valley up into paddocks?

A. That I wouldn't know. I never paid attention what went on on private lands. I don't remember what they did on the private lands.



(Testimony of Karl Henry Korte.)

Q. Well, wouldn't you naturally observe that if you would see working parties?

A. You would see fences and what not, but I wouldn't know what was going on, see.

Q. So far as you know, you didn't see any working parties; is that it? [220]

A. I wouldn't say that here. I might have and I might not have, because I didn't pay any attention to anything that went out on the private lands.

Q. Well, if there had been any working parties on the boundary fence, you would have noticed that?

A. Yes, I would have seen them.

Q. You never saw any working parties?

A. No, not on the boundary fence.

Q. Or on the adjacent paddocks?

A. That I don't know on adjacent paddocks.

Mr. Anthony: No further questions.

Mr. Deuel: That will be all unless the Court has some questions.

The Court: No.

Mr. Deuel: You may be excused, then, Mr. Korte.

(Witness excused.)

Mr. Deuel: I would like to recall Mr. Rodrigues to the stand now, your Honor.

MANUEL RODRIGUES

recalled as a witness on behalf of the defendant, having been previously duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Deuel:

Q. You have already been sworn, Mr. Rodrigues. Will [221] you try to keep your voice up a little bit.

A. Yes.

Q. You will probably recall when you were sitting back there it was a little difficult to hear Mr. Sanborn. I believe you have already stated that for a period of many years you were familiar with the McCandless Ranch areas out there at Makua and Kuaokala.

A. Yes.

Q. And you were there working from time to time through 1941 and for a while into 1942; is that right?

A. Yes.

Q. During the time that you were there, right late, 1941, and around the time of the outbreak of the war, December 7, 1941, did your duties take you up so that you would have any occasion to observe the fence area between the Makua lands and the Makua Forest Reserve?

A. Well, in the forest reserve since that the Board of Forestry haven't got nothing to do with the forest fence there, the agreement with McCandless that they supposed to repair the fence.

Q. I understand that. What I am getting at, Mr. Rodrigues, and I will refer you on the map

(Testimony of Manuel Rodrigues.)

here, Can you see this area—Can you see this all right or do you have trouble? I am speaking of the fence between the upper end of the Makua Ranch and the forest reserve on up above it. Do you recall [222] that there was a forest reserve up above that?

A. There is a fence from a water trough runs up, comes through Koiahi and then up to that other portion, we call it—I forget the name now. Well, that fence was in good order, because I repair that fence when I was there.

Q. What I am talking about——

A. But the forest fence very poor condition, very poor fence.

Q. You do recall—You know which was the forest boundary fence?

A. Yes, when I was a ranger I used to go there time after time.

Q. You state that that fence was in poor condition? A. Very poor condition.

Q. Can you state whether or not that fence was in that condition at the time, late in 1941, about the outbreak of the war?

A. It was still the same.

Q. Was it in a stock proof condition, or could cattle get through it?

A. Cattle could walk in and walk out.

Q. Did you observe whether cattle did go into that forest area?

A. There was cattle going in and out there be-

(Testimony of Manuel Rodrigues.)

cause the fence—those cattles when they put their head in through the [223] wire they walk right through.

Q. So that you know at that time, at the time of the outbreak of the war, there were a number of the McCandless cattle up in that Makua Forest area; is that right? In the Makua Forest Reserve area?

A. There were, yes.

Q. And speaking of the Kuaokala area now——

A. Yes.

Q. Up on the plateau there, you know there was a forest reserve area up in there, too, do you not?

A. Yes, I built that forest fence when I was with the ranger, CC foreman, anyway.

Q. That is not the particular fence I am talking about.

A. That is all in Dillingham's.

Q. If you look closely, can you see this map?

A. I can't see.

Q. You say you can or can't?

A. No, I can't see it.

Q. Now, getting back to the condition of the cattle on the McCandless Ranch, you said you were familiar working with those cattle.

A. Yes.

Q. You had worked with cattle and had experience with cattle for quite a number of years? [224]

A. Yes.

Q. While you were working there in 1941 and 1942, you observed those cattle, did you not, so that you know what they were like?

A. Yes, I observed them, because they are very poor, they are dying one by one or two by two.

(Testimony of Manuel Rodrigues.)

Q. Did you observe them closely enough to know whether any of them, or any appreciable number of them, were infected with tuberculosis?

A. Most of them tuberculosis, yes.

Q. Well, would you say that there were quite a few of them that had tuberculosis or just a few?

A. About 25 per cent.

Q. Of the general herd?

A. Whole area of Makua.

Q. And you have already testified regarding the fact that the cattle were inbred. Were the cattle there what is generally known as scrub type cattle?

A. Yes, sir.

Q. Now with regard to cattle which were ranging out into the forest area, can you tell us whether or not you observed whether those cattle were tame or wild; would they be easy to catch there?

A. Some there without a brand. When there is any cattle in the forest without any brand, they call those the [225] wild cattle.

Q. Well, did you make efforts to try and get some of those cattle?

A. Yes, when I was a ranger I always—Old Man Mr. McCandless always send me there to get after the boys to get them out. We gets them out and then different herds go inside the forest and stayed there.

Q. Now you have stated that you were in the area there for a while in 1942. A. Yes, sir.

Q. And that was after there had been a few Army troops come in?



(Testimony of Manuel Rodrigues.)

A. Well, very few there, just one captain with, I think it is about 35 men, that is all.

Q. In which area was that?

A. They were living just opposite Marks' ranch house. There was a little open field. And some down to the other end of Makua where the railroad section was, where they are living on the beachside. That is all.

Q. Those that were up on the Makua side of the railroad?

A. Right in the town of Makua, back of Makua Church, a little open field. They were there camping there.

Q. Did they go very far back up into the valley?

A. When I was there I had to report to the captain, so when they moves out we get scared going round looking at [226] water troughs, we might find shot around. They have to keep them out of the range all the time and there was strict orders not to go in the range when I was there, because we was scared to go looking for the water trough.

Q. You say the troops did or did not go up in the range?

A. Well, they sneak off and take a gun with them and see any goats around the range they take a shot at them.

Q. You are speaking of individual soldiers?

A. That is all, they go and they send a guard after.

(Testimony of Manuel Rodrigues.)

Q. There has been some evidence in the case when you weren't here to the effect that the McCandless cattle were kept away from the water supply there in the area. Did you observe anything in that regard? A. Not when I was there.

Q. Did you notice whether or not cattle had access to the water? Were they able to get to the water?

A. I take care of the water trough every day. I goes to Keawaula and take care of that water trough and come back to Makua and take care of those, because we didn't have enough men to work. One man had to go to Waianae and some have to cut grass.

Q. You saw that the cattle actually were able to get the water?

A. Yes, they get their water. [227]

Q. In the Makua area there do you know anything about the construction in 1941 of some cross fencing to divide that up into four paddocks?

A. Well, that fence back of Makua up to Koiahi range, there is a hill there—we call it Koiahi—and that fence was completely in good order. We had that repair before the war.

Q. I am talking about fences which broke that Makua area up into four paddocks. Did you know they were building them?

A. Way down there is no fence at all. They come and go. Upper, this portion of the land, they have a fence there, but the gates were all wide open. The cattle can go back and forth.

(Testimony of Manuel Rodrigues.)

Q. Now, you had been out there quite a lot for a period of years. Did you ever observe before the war whether or not any of the McCandless stock got out onto the railroad right-of-way?

A. Well, if they get out on the railroad right-of-way, the Army or anybody has nothing to say with it, because it is the railroad fence and McCandless——

Q. I am asking you about the time before the war ever started. Did cattle ever get out there, cattle or horses?

A. Oh, yes, they did.

Q. Now, from your observation out there in 1941, early 1942—1941 and early 1942, do you know anything about there [228] being some pigs there that belonged to the McCandless Estate?

A. Yes, they have.

Q. How were those pigs kept up? Can you tell us something about those pigs?

A. Very poor feed. They only give them middling and water, that is all. That is all what they eat.

Q. What and water?

A. Middling.

Mr. Anthony: Middling?

The Witness: Middling, two times a day.

Q. (By Mr. Deuel): Was that enough for the pigs to eat or did the pigs have to range around?

A. No, that ain't enough.

Q. The pigs were scattered all over?

A. They come in the morning and eat, then they goes out open field. When they ring a bell in the afternoon, they come back and get something to eat. They come back and then gone again.

(Testimony of Manuel Rodrigues.)

Q. Do you have any idea, just roughly, how many pigs there were there?

A. There were about 150 in total, that is, the mother and little ones.

Q. That is counting all the pigs? A. Yes.

Q. Mr. Rodrigues, there was another McCandless ranch, [229] I understand, down around Waianae, that is, near Lualualei, in that area. Did you ever have occasion during this time, in 1941 and early 1942, to go down around there? A. Yes, sir.

Q. Did you work there some, on occasion?

A. We used to go out there and get cattle out of the plantation ground because it goes in there and eat cane, so we had to go and get them out.

Q. Outside the McCandless Ranch?

A. Outside the Government road in the plantation ground.

Mr. Anthony: I object to this. It is not relevant to any issue here.

Mr. Deuel: I understood that Mr. Marks testified, your Honor, that there were 30 head of cattle lost in this area. Am I mistaken?

Mr. Anthony: No. That is right.

Mr. Deuel: It has nothing to do with getting into the plantation. What I am leading up to, your Honor, is that their fence in this area was not in stock proof condition. It does have to do with their loss. If the cattle had been wandering out there before the Army ever came in, the Army is

(Testimony of Manuel Rodrigues.)

not responsible for the fact that cattle were outside the ranch area there.

Th Court: Well, I assume you are just asking this [230] one question.

Mr. Anthony: I will withdraw the objection.

Mr. Deuel: That is as far as I was going on that.

The Court: All right.

Q. (By Mr. Deuel): Mr. Rodrigues, in that area we are talking about, the same area you have spoken of where the cattle got out on the plantation——

A. Yes.

Q. (Continuing): ——did you observe what the condition of the McCandless fence was along the boundary there?

A. Well, it is all poor fence, because they have a regular one wire. We nail a stave. That stave between it has rubber branches to put in between, gets rotten any time.

Q. Just before and up to the time the war broke out, was that fence in a stock proof condition or not?

A. No, it was still the same. There was only one fence. Marks can say that because there was a hog wire fence and the other side of that fence it is a straight wire.

The Court: How many wires high?

The Witness: Five wires.

The Court: All right.

The Witness: Would be, according to the law, 6-foot fence.

Mr. Deuel: You may cross-examine. [231]



(Testimony of Manuel Rodrigues.)

Cross-Examination

By Mr. Anthony:

Q. Did you ever go up to Kuaokala after the outbreak of the war? A. Yes.

Q. Did you see the pipe that was cut by the soldiers, the water pipe?

A. No, I haven't seen that.

Q. Was there a water pipe cut up there?

A. Well, the pipe was all rotten. The water leaks, were leaks there, that is all. They didn't have nobody to repair for it. If the Army put it in, why they must have repaired to to save the water. That I don't know.

Q. Did you see a cistern up there?

A. I don't know.

Q. You don't know whether there was any cistern there at all? A. No.

Q. At Kuaokala? A. No.

Q. You don't know that? A. No, sir.

Q. Did you see any Army trucks go back and forth over the McCandless Ranch?

A. Well, in Makua there they are, but not Kuaokala [232] because trucks can't get there.

Q. In Makua, though?

A. Yes, but they run as far as the middle fence, that is all. They can't go up any further.

Q. You noticed that the fences were cut down, but by the Army? A. Not in my time.

Q. Not in your time?

(Testimony of Manuel Rodrigues.)

A. Not in my time, because there were only a few men and nobody cut the wire. After I left there they might do it, I don't know.

Q. When did you leave?

A. After the blitz I left there.

Q. You left on December 7, didn't you?

A. I was there. I was working before that.

Q. Did you leave the following Monday?

A. After that I left, I think, in March or April. Then I left there. I get hurt and I came to town and nobody take care of me. They won't pay my bills of my eye, not even my salary, so I quit again.

Q. How did you get hurt?

A. Algaroba trees. I was chasing wild cattle, got hit.

Q. You were injured?

A. Yes, I came in to see the doctor. Rang up the [233] driver, so they absolutely refused to come and get me to go to town, so I came myself; not Marks, I don't know those things, but it was under his supervisor man, Matthew; they refused to come and get me to bring me to town.

Q. You were under Workmen's Compensation, weren't you?

A. I suppose yes; I suppose so. I don't know.

The Court: I don't believe domestic servants and farm laborers come under Workmen's Compensation.

Mr. Anthony: Well, the practice varies, your Honor. Some of them are covered, whether the

(Testimony of Manuel Rodrigues.)

statute requires it or not, by insurance policies.

The Court: Oh.

Mr. Anthony: Many concerns do, I know that.

Q. (By Mr. Anthony): Who was it refused to come and get you?

A. Matthew. Matthew Kali. He was the man driving for McCandless as a driver.

Q. Did you ever ask anybody to pay your doctor's bill?

A. Well, Dr. Trexler, he says he will do that, see, because I couldn't able to see, so he send me home under care.

Q. You figure you have not been used too well by the McCandless Ranch; is that right?

A. Yes.

Q. You think they haven't treated you right?

A. I guess Marks haven't heard, though, so it is up to Matthew. If Marks ever heard, he might treat me in a fair way, but I don't think he knows anything about it.

Q. Now, you left there in you say March or April?

A. Yes.

Q. You said one of the fences was in bad condition and one was in good condition?

A. Yes.

Q. Can you give us the location of where the fence was in bad condition?

A. It is about a mile from Makua railroad track. That is right there Marks ranch house to the middle gate. From there up to Koilahi that fence is completely good, because we had it repaired before the

(Testimony of Manuel Rodrigues.)

blitz came in. We repaired it, put new posts and new wires, everything.

Q. That is one of the cross fences across the valley?

A. Yes, set right in this part (indicating).

Q. How about the boundary fences?

A. Boundary fences was all stone wall and wire and stone wall.

Q. Barbed wire?

A. No, straight wire; stone wall, wire and everything cattle go jump over them and push them over.

Q. Well, was there a gang working on that cross fence when you left? [235]

A. No, nobody at all. They had no enough men to do that work, because they have to attend to the water there and had no enough men.

Mr. Anthony: No further questions.

### Redirect Examination

By Mr. Deuel:

Q. I want to get back at one point, Mr. Rodrigues. You say you continued working at the ranch until about March or April of 1942? A. Yes.

Q. During that period of time were the McCandless employees still working around and conducting ranch operations?

A. Yes, still driving cattle in Makua for the butcher.

Q. Still living around the same as they had before?

(Testimony of Manuel Rodrigues.)

A. The last drive I made in Makua got some butcher cattle, and I get hurt and that is the last thing.

Mr. Deuel: That is all. That is all, Mr. Rodrigues, unless the Court has some questions.

(Witness excused.)

Mr. Deuel: Does your Honor desire that I call another witness now? My next witness is a man who will be on for quite a little while.

The Court: Well, I don't think I can go any further with this case until Friday morning.

Mr. Deuel: Same time, your Honor, 10:00 o'clock [236] Friday, you mean.

The Court: Yes. If we start at 10:00 o'clock Friday, can we get through by noon?

Mr. Deuel: I have two witnesses.

Mr. Anthony: I don't know how many witnesses he has.

Mr. Deuel: I have two witnesses, your Honor.

Mr. Anthony: What are they going to testify about? One on value?

Mr. Deuel: One valuation witness, yes.

Mr. Anthony: What is the other one?

Mr. Deuel: The other one, general conditions and experience.

Mr. Anthony: Well, we had better start not later than 9:30, then, Friday morning.

Mr. Deuel: 9:30.

Mr. Anthony: Very well, your Honor.



(Thereupon, at 11:40 a.m., an adjournment was taken until 9:30 a.m., Friday, February 17, 1950.) [237]

\* \* \*

February 17, 1950

The Clerk: Civil No. 886, A. Lester Marks and Bishop Trust Co., Ltd., Executer, administrator, C.T.A. and Trustees of the Estate of L. L. McCandless, deceased, vs. United States of America. For further trial.

Mr. Deuel: Call Mr. Child, please.

JOHN FRANCIS CHILD, JR.

called as a witness on behalf of the defendant, being first duly sworn, was examined and testified as follows:

The Clerk: Just sit down, Mr. Child, please.

Direct Examination

By Mr. Deuel:

Q. Will you please state your full name, your residence and occupation.

A. John Francis Child, Jr., 2535 Pacific Heights Road, 37 years old, real estate analyst and appraiser.

Q. Mr. Child, were you born and raised in this community? A. Yes, I was.

Q. Have you lived here all your lifetime?

A. I lived here all my life with the exception of a short period away at school. I have been in business here subsequent to returning from school.

Q. And you are in the real estate appraisal

(Testimony of John Francis Child, Jr.)

business; [238] how many years have you been in that business?

A. I have been in that business since 1936.

Q. Did you have any experience in that field before that, or training?

A. At University of Pennsylvania I majored in real estate and finance, and I had a little bit of training prior to that time through business deals that my father was interested in.

Q. Will you tell the Court since your entry in the business here in 1936 what your experience has been in the field of real estate and appraisal matters.

A. From 1936 up to the beginning of the war I did considerable appraising of small homes and properties within the Honolulu area. Beginning with the war period I did condemnation appraising for Federal Government and was later on the staff as a staff appraiser for the 14th Naval District, Department of Public Works, and subsequent to that time I have been doing private appraising of various types, covering fishing rights, fisheries, ranch lands, farm lands, urban business properties, and almost all types of property, as an independent contractor and appraiser.

Q. Have you had occasion before this to appear in any court or courts as an expert on appraisal of real estate matters?

A. Yes, I have appeared in this Federal Court in the [239] other chamber several times in condemnation cases. Also in the Territorial courts.

Q. Mr. Child, are you familiar with the area in the northwest end of this island which for a number

(Testimony of John Francis Child, Jr.)

of years, quite a number of years, was operated by, and known as, the McCandless Ranch, that is, in the Makua Valley, so-called, and up on the Kuaokala area, and in that regard I will show you an exhibit which is Joint Exhibit A in this case? The areas of which I speak are outlined in blue in this area. One is designated in blue writing as Lease No. 1740 and the other one, Lease No. 1741. Are you familiar with those areas?

A. I have been familiar with those areas generally over a period of years, more particularly Makua area, and recently have gone over both areas and am familiar with them.

Q. In regard to those areas, Mr. Child, have you been employed by the Government to make an appraisal with regard to leasehold values?

A. Yes, I have.

Q. And did you make such an appraisal?

A. Yes, I have completed a study and appraisal of the leasehold, of the leasehold values of certain lands and improvements, including these leases.

Q. In making such appraisal did you relate your valuations to about the time of the outbreak of the war and very shortly subsequent thereto?

A. Yes, particularly around December 7, 1941, and just subsequently thereto.

Q. Will you tell the court what you did in regard to making this appraisal?

A. I assembled maps and the files of the Government in connection with the case in question and made a study of various leases in the area of cattle of cattle production in that area, particularly of the

(Testimony of John Francis Child, Jr.)

Waianae Plantation. I visited the lands around Makua as completely as I could without going into restricted areas on foot and then I went over the whole Makua and the 1741 lease area in a helicopter with a view to covering the whole area as thoroughly as I could. I studied some of the records on file also for additional information, conferred with people, slaughter houses purchasing meat, and talked to people at the University with a view to obtaining as much information as possible.

Q. In making this appraisal did you consider this land on the basis of its being Territorial leased land for pasture purposes? A. Yes, I did.

Q. And as a result of your appraisal did you arrive at a fair market value as of the period stated, that is, fair market value for the leasehold? [241]

Mr. Anthony: I object to that. That is irrelevant. This is not a condemnation. This tort took place not on December 7, but during the entire period. They weren't condemning it as of a given date.

Mr. Deuel: If the Court please, it is my understanding they are contending for use and occupancy in the sense of an entry and the taking. If there were a tort, which the Government does not admit, in this regard, then the valuation constituted the taking at the time of entry, which they contend was at that period. Therefore the valuation should relate to that period.

The Court: Well, Mr. Anthony, you put in testi-



(Testimony of John Francis Child, Jr.)

mony as to the value of the leasehold, the remaining term.

Mr. Anthony: During the term, yes, that is correct, but this is a little bit different. Maybe I can take it up in argument. He is treating it as a condemnation proceeding.

The Court: The question doesn't convey much meaning to me. Of course, the answer might explain the question, I don't know, but as I get it, it is value of the land for leasehold purposes as of December 1941 and shortly after that; it doesn't seem to mean much to me. Can't you reframe the question in some way?

Mr. Deuel: I intended to ask the witness, your Honor, if he had formulated an opinion of fair value, that is, rental value, of this area, not the fee value, but the [242] leasehold value, or the rental value, based upon the time that is contended here that the entry was made by the Government, namely, about the outbreak of the war.

The Court: Well, leasehold value for what term?

Mr. Deuel: Mr. Marks testified, as you recall, that he placed a month-by-month rental on it for \$1125 for the whole area. I am getting at the same thing here, your Honor.

The Court: You didn't say that to the witness, that you wanted a month-by-month value.

Q. (By Mr. Deuel): Did you arrive, Mr. Child, at an opinion of fair market value for the remaining terms of these leases, as stated in the leases, which



(Testimony of John Francis Child, Jr.)  
would expire on December 29, 1946, of a valuation month by month?

A. Since I was unable to have an exact term, or an exact date for the term, I broke it down on a monthly increment basis, with the general viewpoint of market value as of the period around the time the war broke out and subsequently, and I have formulated an opinion of the monthly amount during that period which would result in an over-all leasehold value.

The Court: Objection overruled.

Q. (By Mr. Deuel): Did you make that valuation for each lease separately, Mr. Child?

A. In my valuation I broke it down into the range land for each lease separately and for improvements on—that [243] is, building improvements on Lease 1740 and the range improvements on Lease 1741, separately.

Q. Will you tell us what your valuations were as to each lease, that is, by the month.

A. Breaking it down——

Q. That is, rental value.

A. The range and range improvement value per month represented in the premium of the leasehold would be, for Lease 1740——

The Court: What do you mean——

Mr. Anthony: I object to “premium.”

The Court: (Continuing) ——“premium of the leasehold”?

Mr. Deuel: I believe the witness can explain that, your Honor, what we are getting at in this

(Testimony of John Francis Child, Jr.)

method. It will result in the same figure, but he is breaking it down, what he considered a premium over and above the rent reserve. He will add that to the rent reserve and arrive at the figure. He arrives at a total valuation just the same.

Mr. Anthony: Rent reserve has nothing to do with it. If he is an expert, he can testify what the fair rental value is. It is for the Court to do any arithmetic, subtracting any rent reserve. It is not up to him.

Mr. Deuel: I will reframe my question.

The Court: All right. You say you considered these two leaseholds as separate entities, but in making your estimate of value—and I suppose you base it upon a stock raising ranch value; is that so?

The Witness: That's correct.

The Court: Well, now, what I want to know in that connection is whether you treated each one as a separate, independent stock ranch or whether you treated the two of them together and connected as a larger ranch, a ranch that would encompass both of them, but giving each leasehold a value by visualizing the whole thing as one operating concern. Do you understand?

The Witness: Yes, I did the latter, your Honor.

Mr. Deuel: The reason, your Honor, I have asked the witness to break these down separately is by virtue of the facts in the case. Your Honor will recall that Mr. Marks testified that he received from the Army in 1942 reimbursement for six months' rental on Lease 1741. It will be our contention that,

(Testimony of John Francis Child, Jr.)

having been reimbursed for that, that that period should be out, and we have to break these down separately. It will also be our contention that there was a joint occupancy of the premises for the first few months there, and it will be up to your Honor to determine.

The Court: All right.

Mr. Deuel: Therefore, it will be more helpful, I believe, to get these broken down, although he considered [245] the whole thing as an operating unit, to have it broken down as to each lease.

The Court: Go ahead.

Q. (By Mr. Deuel): Will you, Mr. Child, without breaking down the premium, so called, and the reserve rental, state what you determined to be the fair value by the month of Lease 1740.

A. \$182.50, including everything, per month.

Q. Is that the correct figure?

A. I am sorry. \$299.54 per month.

Q. And did that include the McCandless houses?

The Court: That is the premium value?

The Witness: No, that is the entire monthly value.

Mr. Deuel: Mr. Anthony raised the objection regarding the breaking down of this as to premium and reserve rental and adding them.

The Court: I heard him.

Mr. Deuel: We are avoiding that, your Honor, and giving the over-all value.

The Court: All right.

Mr. Deuel: At this point, your Honor—I had meant to do it earlier—we have pictures of the Mc-

(Testimony of John Francis Child, Jr.)

Candless house that was spoken of on the beach area there and the guest cottage, and I believe by agreement with Mr. Anthony, he agrees that they may go in. [246]

Mr. Anthony: Let me see them. (Handed to Counsel.) No objection, your Honor.

The Court: Have you any pictures of the new house that was built for the McCandless Estate?

Mr. Deuel: No, I don't believe so, your Honor. I am not certain whether he answered my last question.

Q. (By Mr. Deuel): Mr. Child, did your figure of \$299.54 on Lease 1740 include these improvements that were shown in these pictures just introduced in evidence, the McCandless house and guest cottage? A. Yes.

The Clerk: Do these exhibits come in as one or three?

Mr. Deuel: It makes no difference.

The Court: Put them in as one.

The Clerk: United States Exhibit No. 5-A, B and C.

The Court: Mark them as they are handed to you.

(Thereupon, the documents above-referred to were received in evidence as United States Exhibit No. 5-A, 5-B and 5-C.)

Mr. Anthony: Was there an answer?

(Answer read.)

Mr. Anthony: Is that your answer?



(Testimony of John Francis Child, Jr.)

The Witness: Yes.

Q. (By Mr. Deuel): With regard to Lease 1741, Mr. [247] Child, will you state what your monthly total value on that is for rental purposes.

A. \$136.33 per month.

Q. And on the two of them, which you say you considered for all purposes as an operating unit, the total monthly rental would be what?

A. \$435.87.

Q. In arriving at these figures, Mr. Child, what was the basis of your computation?

A. In connection with the range lands I made an investigation of various Government and other leases in the Waianae District, the cattle production in that area, records that I could get, primarily those of the Waianae Plantation for the Makaha Valley, which is adjacent to Makua. I considered that ranchers—considered that rentals are approximately the same for land as an increment for feeding cattle, that is, what it costs to feed cattle is in direct proportion to the amount paid in rent and carrying capacity of the range. The price which was paid by slaughter houses in Hawaii for beef, live weight beef delivered to slaughter houses—I studied that and found that in 1925, at the inception of the lease, that average prices paid for steers were \$17.57 a hundred weight. These figures are from the records of the Hawaiian Meat Company. I studied the records through a number of years and compared them with lease rentals that were [248] executed in those years, and in 1941—I will mention



(Testimony of John Francis Child, Jr.)

that for cows in 1925 the price paid was \$16.59 per hundred weight.

The Court: Sixteen what?

The Witness: Fifty-nine.

A. (Continuing): In 1941 for steers it was \$18.74 and for cows, \$16.63, there being a very small difference between 1925 and 1941. In 1942, which was immediately after this period, the price for steers was \$21.98 and for cows, \$18.76. The value of the range, providing it was very much the same in '25, or assuming that it was very much the same in 1925 as it was in 1941, would have been very much the same. However, from records and other information I was able to obtain, the range was improved during that period.

Allowance being made for these improvements, and again in connection with the carrying capacity of Waianae, which had 5500 acres in Makaha Valley and carrying about 800 head in that area of black Angus, Aberdeen Angus blooded cattle, and of the 5500 acres about 2700, between 27 and 28 hundred, were good haole koa and kiawe and grassland areas that were considered good pasture, and the rest was marginal and pali pasturage—making comparisons here, I classified the lands within these two leases in general, going over them with contour maps and by observation, I believe that the Makua Valley area is similar to that of Makaha. The upper areas of 1741 are not as accessible as the Makaha area, and I took [249] some pictures up there. The grasslands somewhat in some places subject to consider-

(Testimony of John Francis Child, Jr.)

ably more wind, with incised gulches with haole koa in them and considerably different type of land from Makaha.

I studied Mokuleia Ranch lease adjacent on the Kaena side, windward side of this area, with a few others, being perhaps more comparable. However, I think the lands on top are of better quality. Considering the lands under lease in 1740, that they had been given attention and that haole koa had been increased and some grass planted, I estimated a premium over the contract rent which had been agreed upon in 1925; also, as I stated, in consideration with the beef price being approximately the same or maybe slightly more. Feeling that the average——

Mr. Anthony: Just a minute. Is this in answer to any question, your Honor, or what are we doing there? I don't think he has been asked any question.

Mr. Deuel: If the reporter will read my question——

The Court: I think he asked a question. I don't recall what it was.

Mr. Anthony: It has been so long ago, I would rather have it proceed by question and answer rather than have Mr. Child talk to us.

The Court: I think he was asked to explain what he took into consideration. [250]

Mr. Anthony: Very well.

Mr. Deuel: Go ahead, Mr. Child.

A. (Continuing): An average for the area within 1740, \$1 per acre over all, with some of the

(Testimony of John Francis Child, Jr.)

better areas at \$2.50, \$1.75, and range down to pali land at about 12½ cents, marginal pasturage.

In 1741, which is not considered as accessible classified lands, form \$2.50 there again down to 12½, but with an average of 65 cents per acre over all. The figures on the——

The Court: Did you give an average on Lease 1740?

The Witness: Yes, \$1.

The Court: \$1. And that, you say, was the premium, or what?

The Witness: No, that is the rental that I allocated. The contract rental was 61½ cents over all. Premium for the whole area for 1740 is \$72.50—I am sorry, \$870.50 per annum on that basis.

The Court: For which lease?

The Witness: 1740.

The Court: \$870.50.

The Witness: For Lease 1741, premium was \$346. In Lease 1740 I allowed—I figured the monthly rental at \$72.50 and allowed for range improvements of fences and other improvements, excluding the houses and dwellings, of \$10 a month, making a premium of \$82.50. The two houses, I believe, [251] would have brought \$100 a month; that is, the large dwelling at sixty-five and the guest cottage at thirty-five, making a total of \$182.50 per month premium over the contract rent.

The Court: Premium of what?

The Witness: \$182.50.

(Testimony of John Francis Child, Jr.)

The Court: That, with the rental, makes you \$299.56, does it?

The Witness: That's correct, fifty-four. On Lease 1741 monthly premium was \$28.83. I have no knowledge of special range improvements there and made no allowance; and with the contract rent that would be \$136.33.

Mr. Deuel: You may cross-examine.

### Cross-Examination

By Mr. Anthony:

Q. What is your over-all figure rental per annum of these two leases with all the improvements, Mr. Child? There are approximately 4700 acres; right?

A. That's correct. That would be, if my figures are correct, \$5220.44 per annum.

The Court: Fifty-two hundred what?

The Witness: Twenty dollars and forty-four cents.

Q. (By Mr. Anthony): Do you know of any ranch property of this area on the island of Oahu that would rent for anything like that?

A. I studied leases in that area and found——

Q. Will you answer the question.

A. Well, I——

Q. Can you answer the question?

A. I think that this property would lease for that amount, but I know of no others that have been leased at that.

Q. What is your answer? Do you know of any? Your answer is "no"?

A. That's right.



(Testimony of John Francis Child, Jr.)

The Court: You mean at the present time?

Mr. Anthony: Or within the last five years.

The Witness: Well, within the last five years I know of properties that would lease more but at that time I knew of none that would have leased for more.

Q. (By Mr. Anthony): What is the fair market value, in your opinion, of pasture land on the island of Oahu during the term of this lease?

A. Well, that is a difficult thing for me to say without knowing what area and the quality and other things about it.

Q. Well, do you know of any——

A. But the average rental range for all Territorial leases on this island was around 78 cents, and if you capitalize that amount, that would give a pretty good idea, if we say——

Q. Let's confine ourselves to leases that were entered into subsequent to 1942. [253]

Mr. Deuel: If the Court please, the Government contends that if there were wrong done here of wrongful entry of taking over this property that it was done at the early stages of the war and that constituted—which we do not admit, but it would have constituted the taking at that time, and that fixes the valuation dates for this purpose.

The Court: Well, yes, but these leases had some five years or thereabouts to run.

Mr. Deuel: That is correct, your Honor, but if there was a taking, then it was a taking over of a lease as of that time.



(Testimony of John Francis Child, Jr.)

The Court: Yes. How are you going to determine what the value of these unexpired terms was?

Mr. Deuel: Just by determining what the value was at that time, what the purchaser in the market and the seller would have negotiated for.

Mr. Anthony: I think I can ask Counsel a question that will point this up. Is the United States willing to stipulate that we receive interest on the damages that have been reflected upon the plaintiff in this case?

Mr. Deuel: Not willing to; the statute would preclude me from it.

Mr. Anthony: Precisely. If this were a condemnation case, they would have to make a deposit and then when the case was tried if there was a deficiency, we would get interest [254] on the taking. This is not a condemnation case. This is a case in which we are trying to get paid for the use and occupancy during the term of the lease, the value during that period.

Mr. Deuel: If the lease were taken over and occupancy, as contended, were to sustain in the early stages of the war, and that is the taking over for the whole period, that fixes the valuation time. I submit that values that might have accrued at later times, whether up or down or what, are not proper for comparison.

The Court: Overruled.

Mr. Anthony: Will you answer the question?

The Witness: I am sorry. I thought I had. May I have it read.

(Testimony of John Francis Child, Jr.)

Q. (By Mr. Anthony): Do you know the value of pasture lands that were leased subsequent to 1942?

The Court: Value of land, what do you mean there?

Mr. Anthony: Rental value.

A. Well, I can say this, that it increased year by year subsequent.

Q. (By Mr. Anthony): Isn't it a fact that some of those lands in the Waianae District were leased shortly after the outbreak of war, pasture lands?

A. Well, I know of several around 1944 and 1945, as I recall. [255]

The Court: The Court finds it needful to take a brief recess.

(Recess had.)

Q. (By Mr. Anthony): Mr. Child, are you familiar with the Government leases which were sold at public auction in 1944?

A. Yes, generally familiar with them.

Mr. Deuel: May the record show a continuing objection to this line of questioning.

The Court: Well, I don't care for that kind of an objection. I would rather have it specific as to a matter of this kind.

Mr. Deuel: It is all on the same basis.

The Court: The question now is, Is he familiar, and he says "yes."

Q. (By Mr. Anthony): They were of similar lands, pasture lands, sold at public auction?

A. That's correct.

(Testimony of John Francis Child, Jr.)

Q. Are you familiar with the Government lease of Territorial pasture land in 1944 of 1678 acres; are you familiar with that transaction?

A. What was the date again?

Q. In 1944, Territorial lease.

A. Yes, I believe there were two or three leases auctioned at that time. I am not sure which one.

Q. This was sold at an average price of \$4.10 per acre.

A. I don't recall the exact amount, but it was a considerable amount, as I recall.

Q. Don't you have any record of that?

The Court: Where was it? What island?

Mr. Anthony: This island, right next door to this land.

The Witness: Is that the Nanakuli lease that you are referring to? I don't have—it is 1755 acres. I am trying to identify it.

Q. (By Mr. Anthony): How many acres?

A. 1755.

Q. What date was that lease sold?

A. That was January 20, 1945.

Q. 1945? A. Yes.

Q. And what was the area?

A. 1755 acres.

Q. And what was the price?

A. \$6700, or approximately \$3.85, I believe, an acre.

Q. Were there any leases sold—that was at public auction? A. Yes. [257]

Q. Any leases sold in 1944?

Mr. Deuel: Your Honor, I would like to renew

(Testimony of John Francis Child, Jr.)

my objection to these questions. What I am getting at is on the same basis as my original objection to bringing out prices of leases sold later than the beginning days of the war, which, as I stated before, are contended by the Government to be the valuation date that should be adopted here, and it is to the questions regarding valuation of leases at later dates that I am objecting to.

The Court: Yes, I understand that there isn't any direct materiality as to that except as to the trend showing the increase in values, whether that has been equally progressive all the time or not. If you want the Court to take any notice of this as having any value at all, you should specify the length of the leases, the term that they run, because that is of vital importance.

Q. (By Mr. Anthony): What is the term of that lease that you have just testified to?

A. From January 20, 1945, to January 20, 1966.

The Court: Twenty-one years.

The Witness: The area is Nanakuli Forest Reserve.

Q. (By Mr. Anthony): The what?

A. The Nanikuli Forest Reserve.

Q. And that was approximately \$3.85 per acre?

A. Yes. [258]

The Court: What are the water facilities on the place?

Q. (By Mr. Anthony): Do you know anything about that?

A. There was water down at the lower end of

(Testimony of John Francis Child, Jr.)

the lease and the incumbent tenant had developed some water facilities, as the Hawaiian Meat Company at the lower end of the pasture. When I saw it, the water was piped in there from the Nanakuli system as a supplementary water supply. The upper areas were carried mostly on rainfall.

The Court: What was the rainfall of the upper area? All of these things are very important to value. Have there been any improvements made? Have there been any grasses planted or only the native grass? Are there sections of it where algaroba was developed or haole koa or any other food plants? All these things are of very vital importance as to the value of the land for ranch purposes. Without them it is practically meaningless to the Court.

Q. (By Mr. Anthony): Do you know these lands that we are talking about at Nanakuli?

A. Yes.

Q. This Government lease. Was there any improvement made on those lands?

A. There was some small improvement made by the Hawaiian Meat Company at the lower end, putting water on it and watering troughs and corral, and so on, and the upper area [259] had been fenced.

Q. How did they compare with the lands in the McCandless Estate that are involved in this case?

A. Well, they are roughly similar to some of the Makua area, having haole koa and kiawe and cactus.



(Testimony of John Francis Child, Jr.)

Q. The feed was similar, the range was similar?

A. Similar to about half of the Makua area.

Q. Well, which is better, or don't you know?

A. Well, by "similar," I mean that the quality would probably be quite close to about half of the area of Makua.

Q. Now, you didn't take the Nanakuli lease at \$3.85 into consideration in fixing your over-all value of \$1, did you?

A. No, I didn't because it occurred at a considerably later date under different conditions and also because of the bidding that took place. In analyzing it, I found that the incumbent tenants in the meat business had analyzed it at a considerably lower rate than had been paid for it, that the successful bidder was a man in the quarry business near by who wanted the area.

Q. Are you familiar with the Kawailoa lease?

A. No.

Q. On this island?

A. I am not familiar with it.

Q. Government lease? [260]

A. Specifically, out in this area.

Q. You determined a question of law that no rental values, no leases subsequent to 1942, had any relevance to the valuation that you should put on the McCandless lease in this case?

A. No, I didn't. That was on advice of Counsel.

Q. I mean, you took the instructions of Mr.—

A. That's correct.

(Testimony of John Francis Child, Jr.)

Q. I see. And, obviously, if that turned out to be in error, namely, that you should determine the value as of the particular year, your figure would be very materially higher, would it not be?

A. I believe that progressively——

The Court: What year?

Mr. Anthony: Just a minute. The year in which the occupation of the land in question occurred. In other words, this term ran to 1946.

Q. (By Mr. Anthony): If you valued it in the year 1946, for instance, you would reach a different figure than you have on your valuation?

A. That is correct.

The Court: Valued it how, for 1944, 1945, or 1946? Do you mean to infer it should be valued by what other leases were bid for?

Mr. Anthony: What I am endeavoring to explain to [261] the witness, your Honor, is this, that our contention is that we are entitled to receive in damages the fair value as of the year in which the land was occupied.

The Court: Yes.

Mr. Anthony: Now, Mr. Deuel's contention is you look solely at the time of entry and you figure out——

The Court: I know he made that contention, but the Court isn't going to follow that contention because, as I said in the beginning, we are not trying a condemnation case. We can't turn this into a condemnation case. Use and occupancy seems to stand in my mind. Now, how are you going to

(Testimony of John Francis Child, Jr.)

determine the value of the use and occupancy by going thus into what leases were bid for in 1945, 1946, or any subsequent time. They have no relation. I can't see any relation.

Mr. Anthony: It will give you rental value of the property.

The Court: No, that doesn't give the rental value of the property unless the lease was canceled and was released on a 21-year basis and the lessee would have time to make improvements to make it more valuable for the purpose that he was leasing it for. If he is renting it on a one- two- or three-year basis, that is the length the lease will run until it is expired, what can he do about it? He can't make any improvements. He can't help himself, and he has to take it as it is now. What is the earning value of the land during this time that the lease would continue to run? Those [262] are the only factors that I can entertain, as I see it.

Mr. Anthony: Well, at this time, then, your Honor, I move to strike the testimony of Mr. Child upon the ground that he has put his entire valuation on an erroneous basis, namely, that it relates to the period at the beginning of 1942 or shortly after 1941 and that is contrary to the rule of law that the Court has just stated.

The Court: I can't see it. You might question him at any length you wish——

Mr. Anthony: Very well.

The Court (Continuing): ——as to his basis, but, as I got it, he put it on an earning capacity

(Testimony of John Francis Child, Jr.)

basis. I assumed, or I gathered that that was the basis he was working on, that here was a lease that paid so much rental, now its earning capacity to the lessee was so much per month per year for the remainder of the year, and he based that, as I gathered it from his figures, upon what the price of beef cattle, the two different kinds at least, was at different times; and it seems to me in general to be a fair approach. You may go into that.

Mr. Anthony: Yes, I will, your Honor.

Q. (By Mr. Anthony): Mr. Child, you have never been in the ranching business, have you?

A. No, I never have been a rancher.

Q. Have you ever had anything to do with a ranch? [263]

A. Yes, I have been interested in—I was interested once in purchasing a share in one. I had a ranch over on Maui for sale and finally sold it to Mr. Vandenberg, made appraisal of it and studied it pretty carefully.

Q. That is Hanahuli subdivision?

A. That's correct. I have had occasion to appraise other——

Q. That is the only experience you have had with a ranch?

A. Well, I have had loan appraisals to make on certain dairy properties and some ranch lands at Koko Head, and I am affiliated with a company that finances importation of cattle and also——

Q. What is that company?

(Testimony of John Francis Child, Jr.)

A. The Honolulu Finance and Thrift Company.

Q. They import cattle, you say?

A. We financed operators who had over a period of years.

Q. Oh. A. We no longer do that, though.

Q. Well, now——

A. I might add one thing to that, if I may. In connection with the study of the ultimate use of the lands at Waianae I have worked with a ranch analyst who had a complete survey.

Q. What is a ranch analyst? [264]

A. A ranch analyst is a man who is familiar with operations and loans and advises insurance companies and others on the value and difficulties in bringing ranches up to better management operations.

Q. Who is this person?

A. A man by the name of C. H. Colvin.

Q. What is his name? A. Colvin.

Q. Where is he from?

A. From Texas, and he was employed by American Factors to make an analysis of Waianae.

Q. We don't have any such thing in this Territory as a ranch analyst; is that it?

A. Well, a ranch analyst maybe is not a well-known term, but it is my description of him.

Q. Have you finished with your explanation?

A. Yes.

Q. I want to ask you some questions. How did you arrive at your figure of first the monthly and



(Testimony of John Francis Child, Jr.)

then the overall value of this property, Mr. Child? What was the basis of it?

A. The basis of my appraisal is, first of all, what, in dollars, the market is for beef, live beef, at a particular period to determine what the outlook was. You also have to take into consideration the cost of feed, and the cost of land [265] is part of that cost of feed.

Q. Well, now, you took the price of beef in 1925; is that right, and compared it with the price in 1941? A. Yes, among other things.

Q. Well, they were the two principal factors—that was the principal factor, was it not?

A. That was one factor. Costs are another that are variable; when you consider what you can afford to pay for land, you have to figure what your other overhead costs are, as well as your market price of beef.

Q. Did you inquire into the price in 1942 and 1943 and 1944, in other words, during the term of this lease, the end of the term of this lease?

A. I did up to 1942, and I did, for trend purposes, investigate later prices and——

Q. Why did you stop at 1942?

A. I think I have stated that I followed the assumption on the advice of Counsel that the property, or the leasehold, is valued primarily from the viewpoint of a person in late 1941 or 1942, at the time occupancy was taken.

Q. If that advice is wrong, your expert opinion is wrong? A. That is correct.

(Testimony of John Francis Child, Jr.)

Q. Do you know whether or not—

Mr. Anthony: Withdraw that. [266]

Q. (By Mr. Anthony): Have you had any familiarity with the dairy business during this period? A. Some.

Q. Do you know that during this period, 1941 to 1946, the dairies on this island needed land to put their cows out to pasture on this island?

A. I know there was a very acute problem.

Q. And there was a very great demand for that, wasn't there? A. That's correct.

Q. In other words, instead of being able to ship to one of the other islands, they had to put their dairy cows out to pasture on this island?

A. That is correct. Transportation costs were one of the factors.

Q. And that would have a tendency to increase the value of pasture land of this character, would it not, during that period?

A. I believe that it would tend to wherever arrangements like that could be made for a temporary period.

Q. Well, the dairies were trying to make such arrangements, weren't they?

A. Yes, but they were interested primarily in short-term arrangements and were seeking lands.

Q. That is just what this was, wasn't it, a short-term arrangement? A. That is correct.

Q. So this was very desirable property from the standpoint of an adjunct to a dairy?

A. That condition that you state would make it

(Testimony of John Francis Child, Jr.)

so, but subsequent in time to the time in my immediate consideration, that is late 1941 and 1942.

Q. Do you know how much dairies were paying for land of this character, pasture land to put out their dry cows, during this period '41 to '46? Do you know?

A. I am just trying to recall. That is a long period of time. I have some knowledge of certain areas.

Q. Well, can you answer my question, Mr. Child? If you can't answer it, why just say so.

A. Well, I can't recall any exact amounts.

Q. Can you recall any inexact amounts?

A. I always like to refer to specific information when I can, and I don't recall. It is dependent on the area and the place.

Q. You described yourself as an analyst, a real estate analyst. Did you ever analyze that problem?

A. I analyzed that problem in connection with dairies on the windward side, which we were financing.

Q. Yes, and what did they pay?

A. I don't recall the amounts. [268]

Q. You didn't think that was relevant to your analysis?

A. I certainly did, but I don't have the figures in mind, and I didn't use it in connection with this particular appraisal valuation.

Q. Why?

A. Because of the location and the fact that there is not as much green grass area as would probably

(Testimony of John Francis Child, Jr.)

be required for dairy pastures for dry cattle. It is not as satisfactory as certain wetter areas, more controllable and better access.

Q. Do you think you are competent to pass on that question?

A. I have worked with people who have been. I am not, as I say, a dairyman or a rancher.

Q. Are there any dairies doing that very thing in the Waianae area now that you know of?

A. I believe the Aiea Dairy leased some property out in that area for such purpose, but on a 21-year lease basis where they could take whatever steps necessary to develop good pasturage for that kind of thing.

Q. What is the rental of that lease?

A. I believe the over-all rent is \$2 and something an acre. I haven't figured.

Q. That is 1678 acres for \$4100 per annum; is that the lease you are talking about?

A. That's right. I think that is about \$2.44 an acre [269] over all.

Q. What was the date of that?

A. That was January 20, 1945.

The Court: What does Hawaiian Meat Company pay the Campbell Estate on the windward side of Waianae slopes, do you know?

The Witness: The lands are not entirely graded within the lease, and as an over-all rental, including the lands on this side, it would be rather difficult to——

The Court: It isn't a per acre rental?



(Testimony of John Francis Child, Jr.)

The Witness: No, it is a gross amount with allowances for various deductions in case of condemnation and at certain rates per acre.

Q. (By Mr. Anthony): Are you sure of that, that it is not a per acre rate in the Hawaiian Meat Company lease?

A. It comes down to a per acre rate in that you can deduct or add acreage.

Q. In the event of condemnation?

A. That's right.

Q. Well, that is normal. You understand that, don't you? A. Yes.

The Court: Have you the figure there?

Mr. Anthony: I don't have it here, but I have a copy of that lease in my office and I am pretty sure the [270] witness is in error.

Q. (By Mr. Anthony): Do you know what the Pupukea Ranch property was leased for on this island?

A. I have that information, but I don't recall.

Q. Well, what is the information?

A. I don't have it here. I have it in my file, but, as I say, I don't recall it, and I didn't consider it.

Q. Was it \$3.29 per acre? Is that to the best of your recollection? A. I wouldn't know.

The Court: What lease?

Mr. Anthony: Kawailoa and Pupukea.

The Court: What?

Mr. Anthony: There are two leases. A lease at Kawailoa and Pupukea.



(Testimony of John Francis Child, Jr.)

The Court: Two?

Mr. Anthony: And I want to know if the witness knows about either one of them.

The Witness: Those are Hawaiian Meat Company leases.

The Court: Where are they located?

Mr. Anthony: On this island at Kawailoa, I believe it is. Waialua Agricultural Company is the owner in fee; whether or not Dillingham comes in there or not I am not certain. There was a lease.

The Court: That is against the Koolau Range?

Mr. Anthony: That is correct, near the Industrial School in that area.

Q. (By Mr. Anthony): Are you familiar with those leases?

A. Not specifically. I know of them, that is all.

Q. You didn't make any study of them for the purposes of this case? A. No, I didn't.

Mr. Anthony: No further questions.

Mr. Deuel: You may be excused, Mr. Child.

(Witness excused.)

Mr. Deuel: Call Sergeant Teague.

#### WILLIAM TEAGUE

called as a witness on behalf of the defendant, being first duly sworn, was examined and testified as follows:

The Clerk: Just sit down, please.

(Testimony of William Teague.)

Direct Examination

By Mr. Deuel:

Q. Sergeant, will you please state your full name?      A. William Teague.

Q. And you are, of course, in the Army of the United States?

A. Yes, I hold the rank of sergeant first class.

Q. And how long have you been in the Army, sir?

A. This is my eleventh year in the Army. [272]

Q. Prior to that what did you do?

A. I was engaged in ranching with my father in the United States, raising of cattle and pigs, and also goats.

Q. Where was that?

A. In Colorado and also in California, and in the central part of Missouri.

Q. How extensive was that experience?

A. Well, all of my life I have been engaged in it with my father.

Q. Cattle and general ranching activities?

A. Yes. At the present time my father has a ranch in northern California.

Q. Sergeant, where were you stationed at the time of the outbreak of the war, December 7?

A. I was at Schofield Barracks stables Sunday morning.

Q. Had you been there for some little time before that?

A. Yes, I first came to the Islands in '39. J

(Testimony of William Teague.)

was stationed with the Hawaiian pack train at Schofield Barracks.

Q. Pack train?

A. Yes, the old Hawaiian pack train.

Q. Now, on and immediately following December 7, what was your assignment, Sergeant?

A. Immediately on December 7, why, we went in the position in the stable area. We were moved from the stable area on the other side of Waianae over near the reservoir, [273] over there with our animals. From there we were moved to what is known as Kaena Point area.

Q. Kaena Point area, you say?

A. That was designated as our protecting area of the island, at Kaena Point area, from Dillingham's across to the other side of the island, what is known over there as the Waianae pocket and Makua, in through there.

Q. I refer you, Sergeant, to the map here, which is Joint Exhibit A, and shown on the map outlined in blue are two areas on which have been written, on one, Lease No. 1740, and on the other, Lease No. 1741. I would like you to state whether or not the areas which you said you were assigned to shortly after December 7 included these areas shown on the map.

A. That was our area, yes, from one side of the ocean to the other.

Q. And how soon after December 7 did you go into that area?

(Testimony of William Teague.)

A. The fourteenth of December we went into position there.

Q. Fourteenth day of December, 1941?

A. 1941, yes, sir.

Q. And will you tell us what your duties consisted of—well, first of all——

Mr. Deuel: Strike that. [274]

Q. (By Mr. Deuel): How long did you remain in and about that area, Sergeant?

A. Permanently till in '43, along in the summer of '43 we was permanently on the positions there in that area.

Q. Will you tell us what, during that period of time from December 14, 1941, up through the spring and summer of 1943, your duties were in this area.

A. My duties were in that area over-all observation of the area. I was in charge of all patrols that was in that area, also in charge of the two OP's that was there, that was observation posts. 109 and 112 that was in that area. I had six machine gun positions and two mortar positions in that area.

Q. During that time did you stay pretty much in one location?

A. I was all over the whole location there. That also included day and night patrols.

Q. In other words, you were constantly patrolling this area?      A. That's right.

Q. Including these areas shown on the map?

A. Because we had to send in reports every four hours from that area in there of our observations.

Q. Did you observe, when you first went into

(Testimony of William Teague.)

the areas, first of all, troops down along the beach areas? [275]

A. There were two squads along the beach area down there. There was approximately, in the two squads, they was manned, and they was approximately about 15 men down there was all there was. They were scattered along with water cooled machine guns.

Q. And did you observe what activities they carried on?

A. They were making emplacements down there and also stringing some barbed wire aprons down in there.

Q. And can you tell us just where all this activity took place? Was it close to the beach or did it go up in toward the mountains?

A. They were along the beach line there, on the beach line and across the railroad, right into the mouth of the Makua pocket, and also the Windmill pocket.

Q. You say "Windmill pocket"?

A. Yes.

Q. What do you refer to as the Windmill pocket?

A. That is in the other area up from Makua here, down in through this area here (indicating).

Q. That is the beach area?

A. That is the beach area. That is known as Windmill Pocket.

Q. But on the map it is right below the area which is printed "Keawaula," the beach area along here? [276]



(Testimony of William Teague.)

A. Yes, right in through there. There is a windmill that sits in that area, and on our observation and our reports it was reported as the Windmill Pocket.

Q. I note on the map there also is the word "Windmill" along there.

A. Yes, it was known on our reports as a Windmill Pocket and this was the Makua Pocket (indicating) up in there.

Q. You have spoken of some troops along the beach areas there. A. Yes.

Q. You mentioned about fifteen. A. Yes.

Q. Two squads of troops, fifteen men.

A. We had one squad, 21st Infantry, and also part of the 19th Infantry was supporting us. They was in this area (indicating).

Q. You are pointing to the Makua Pocket?

A. Yes, in through here (indicating).

Q. That is the beach area, though?

A. Yes. On one point of the pocket there was an observation post there and they was in here with their water cooled machine guns and also in through here, because that was proposed landing, for any of the troops to move back up into the hill area there.

Q. Can you tell us whether or not the troops which [277] were along the beach went back up into the Makua area in the early days of the war?

A. They did not go back up in there, no, because on my patrols I covered all of these areas.

Q. When you say "all of these areas," you are

(Testimony of William Teague.)

pointing both to the ranch areas outlined and forest reserve?

A. Yes, sir, their orders were to stay on the beaches and hold the beaches while we run our patrols back up in there, so they wouldn't conflict with us or anything. We moved back up in these areas (indicating).

The Court: What kind of patrols did you have?

The Witness: We had mounted patrols, mounted on horses, and at night we had our foot patrols, dismounted patrols.

The Court: How many troops?

The Witness: Including the two along——

The Court: I mean in your patrol.

The Witness: Altogether up there is wasn't exceeding 75 men. It also included a supply train that came from down near the Dillingham Ranch. They brought supplies up to us on mules, and also forage and grain they brought up in to us.

The Court: Did they bring it over paths?

The Witness: They brought it up over what is known as Kawaihapai Makua Trail. They made a junction at their [278] trail shelter, because I was—I had my horses up in a gulch just down from the trail shelter, and they brought all of our forage in to us and also rations for the men.

Q. (By Mr. Deuel): You recall, do you not, Sergeant, that sometime late in 1942 the Makua area developed into a training area and more troops were brought in?

A. Later on it did, but the early part there was

(Testimony of William Teague.)

none there, because we was thinly scattered on the point. There were not very many of us.

Q. And when you spoke of 75 men in these whole areas, that was for approximately how long a time? Was that up until the time the training operations started?

A. That was up until the time the training operations started down there and more troops came in from the station.

The Court: Did you have any central camp?

The Witness: Our central located point was what is known as the trail shelter on the Makua Kawaihapai Trail.

The Court: Somewhere along in here (indicating)?

Mr. Deuel: It is in the area designated Kuaokala Forest Reserve on the map.

The Witness: Somewhere in that general area. If I had a trail map, I could mark it off plain.

Q. (By Mr. Deuel): You have mentioned troops along the beach area. Can you tell us what troops there were, if any, up on the Kuaokala area? [279]

A. Well, up in there is where the Hawaiian pack train, that was our holding areas up in there.

Q. What all was up there? Were there installations of some kind?

A. We had two observation posts up there; one was 109, so we could overlook the Windmill Pocket and also into the Makua area. And our other O.P. was generally, I would say, in this locality in here (indicating) so we could observe from the far side

(Testimony of William Teague.)

over in there. Also, our missions were to watch for submarines in through that area.

Q. Up in that area, speaking again of Kuaokala, were there any vehicles running around up there?

A. There were no vehicles, because you cannot get in that area with vehicles. Later on the Army engineers built a road from Dillingham's to the trail shelter. You could get over that with small 3-ton vehicles.

The Court: What point do you call Dillingham's? The Mokuleia?

The Witness: Mokuleia, yes, sir. That is where the old trail used to start from, right back of his barns there, and come up into that area, and also the one that came from Kawaihapai.

Q. (By Mr. Deuel): That trail, I gather from what you said, did not run into this Kuaokala area designated Lease No. 1741? [280]

A. No, it came out through here (indicating) and then across it went, and the other one went down into the Makua Pocket.

Q. I mean the road on which vehicles could travel?

A. No, the road did not. It went as far as what is known as the trail shelter. They said that was maintained by the foresters, this trail shelter they had up there.

Q. Sergeant, in your observations around there, do you recall up in the Kuaokala area that the Army did something with water supply up there?

A. Well, the way on the water supply, it was



(Testimony of William Teague.)

my recommendation on my horses up in there, that they had a spring in a gulch there——

Q. Is that the one, Manini Gulch there?

A. Yes. And with working on this spring, it was a very small seeping that came out of there, so the Army engineers came in there and dug in back to where this spring was. There was always a flow of water coming out of the spring while they was digging, and they constructed a pipe line in from the spring proper, made a small catch basin there, and then on the outside they constructed on the outside there a large concrete tank, or what is known as a cistern or catch basin. The water was piped into that and we utilized from the tank for our water supply for cooking and also for the animals. We had portable canvas water troughs that were kept [281] filled at all times, on the outside of the tank, the large catch tank proper.

Q. Can you tell us, Sergeant, did you observe cattle around in that area?      A. Yes.

Q. Can you tell us from your observation what was done with regard to those cattle in so far as concerned that water supply there?

A. The cattle was never kept from water at all at any time. They always had access to the water, and at times they have often watered down there when we would be watering our horses down there and also our mules; and another thing, in the area wherever we could locate a small seeping spring, we would dig out and make a little wooden dam there for catch basins for water.



(Testimony of William Teague.)

Q. And did the cattle have as free access as your——

A. They had access at all times to the water. They was never kept from it.

Q. Now, with regard to water in the Makua area, do you know anything about that and whether or not cattle were kept from any water in there?

A. They were never kept from there; along down from what we knew as the Makua trail there were small seeping springs in there, and I also instructed patrols down in there to make catch basins in through that for watering purposes. [282] Cattle watered at those places, and if we was on mounted patrols or anything, why in these small seep places we could also water our animals.

Q. Speaking further of the cattle in there, of both areas, now, did you ever observe the troops making any particular disturbance of those cattle?

A. They made no disturbance of cattle at all in there.

Q. When you say "in there," are you speaking of both the Kuaokala, or Lease 1741, and Lease 1740?

A. In both places, yes, because that comes under an order of protecting properties. That is one duty we have as soldiers in the United States Army.

Q. Did you also have specific orders in regard to these cattle?

A. We had orders from our commanding officer; Major Buchanan was commanding officer of the Hawaiian pack train then, and we were not to bother

(Testimony of William Teague.)

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(Testimony of William Teague.)

any cattle or any pigs in our area. Another thing, on saying of bothering or killing, there is strict orders in the Army that no meat or anything like that will be used unless it has been properly inspected by a licensed Government veterinarian officer.

Q. In other words, if any soldier were to do something of that kind, it would be wholly outside of orders and instructions; is that right?

A. That's right, because a person never does know what [283] the meat, whether it is diseased or anything like that. You never use your meats unless they have been passed and approved by your veterinary officers.

Q. You mentioned something about some pigs in here. Did you see some pigs in the area?

A. There was pigs in the area.

Q. Did you see them from time to time?

A. That is right, and there was also a few wild goats in there.

Q. And what were the pigs like that you saw around there?

A. From my observation of them, that was a very poor grade of pigs. I would class them as a wild variety of pigs.

Q. That is, they were roaming all over?

A. Down through the Southern country in the States they would be classed as razor back hogs.

The Court: Well, were they pigs that were frightened of any person approaching near them on horseback?



(Testimony of William Teague.)

The Witness: On the cattle and pigs, no, sir, they never were in there, because we would never make any disturbance to stampede them or anything like that, and they just came all around where our positions was and everything like that. They was with us all the time.

The Court: They were looking for scraps?

The Witness: Well, the pigs, they enjoyed it, what [284] few scraps we had, sir.

Q. (By Mr. Deuel): Sergeant, you spoke of having been raised on a cattle and stock ranch, and from your experience in that regard are you able by observation of cattle to tell something about the quality of cattle? A. Yes.

Q. And you observed these cattle in this area?

A. Yes.

Q. What can you tell us regarding the things you know from your observation regarding those cattle?

A. From my observation of it, they was a poorer grade of cattle, and it seemed like there was no supervision of the care of them at all. There was bulls and calves and everything else just running together up in through there, and there was no supervision of it, it seemed like. There was too much chance of being cross-bred through there, and the bulls looked like they were very poor grade. Also in the unit that was up there there was quite a few that had been raised on ranches in the States.

Q. You are speaking now of the other troops with you?



(Testimony of William Teague.)

A. In the other troops. In the old days they used to pick, in the outfits and everything, they would pick men out that had experience on ranches, particularly on horses, and also cattle, that were put in all the animal units.

Q. From your observation of those animals up there, [285] Sergeant, are you in a position to state whether or not you observed any of them that were sick or tubercular?

A. Well, sir, I couldn't pass on that unless there were proper tests by a veterinarian. That is the only way you can tell. You can't just look at an animal and say he has got tuberculosis or anything else unless the veterinary takes the proper tests.

Q. I presume in your observations up there, Sergeant, that you saw either fences around or remains of fences in the areas; is that correct?

A. Yes.

Q. Do you recall at the upper or mountain end of the Makua Pocket area any kind of a fence between that upper end and along the forest reserve area, or, looking on the map here, it is the line more or less paralleling the ocean, which is farthest away from the ocean?

A. Well, on that, sir, you couldn't very well pass and say it was a fence, because it wasn't, sir. There might have been a fence there at one time, but there were posts and wires on the ground and places where the posts had rotted off, so as an animal might—I wouldn't class it as a fence, sir, because it had no holding qualities at all about it.

(Testimony of William Teague.)

Q. Did you observe that fence sufficiently so that from your experience you could tell whether or not it had just recently been broken down or whether it had been in [286] poor condition for some time?

A. From the looks of it, it had been quite some time since the fences had went down, from the conditions of the posts that had been rotted off, and everything like that, and the wires down, and from all indications and from my own observations of seeing animals going back and forth in through there, of the cattle moving in through there.

Q. In the early days when you first went up there, you saw cattle on both sides of the fence lines?

A. On both sides. It was our duties when we made our patrols, in reports on it and everything, we would report where we would see stock in different areas in there.

Q. It has been testified in the case, Sergeant, that someplace over in this Kuaokala area up on the plateau, Lease 1741, that there was a wing fence in there. Did you see anything of that kind?

A. There was one in there, but it was in a poor state of repair. Also down in the gulch it looked as what had been at one time a holding corral down there is what I would say, where animals had been brought in and held until they was moved out of an area.

Q. Now, from your experience, again, can you say whether or not those fences that we are just speaking of were in a bad state, just newly broken

(Testimony of William Teague.)

down, or whether they had been in a bad state or condition for some time? [287]

A. From my observations, sir, at some time they had been broken down.

Q. You mean both of the fences we are talking about were broken down prior to the war?

A. I would say they were, yes, sir.

Q. You were up there just a week after the war broke out?      A. Yes, sir.

Q. Sergeant, from your experiences up there I have asked you a number of questions about these matters. Can you think of anything else that is pertinent along the lines of the questions I have asked you that we have not brought out?

A. I can't think of anything right at the present time.

Mr. Deuel: You may cross-examine.

### Cross-Examination

By Mr. Anthony:

Q. How long did you stay up there, Sergeant? You said you went there a week after the war broke out; when did you leave?

A. I was there until the summer of '43 permanently, sir. I was right there.

Q. And you stated that you were in command up there; is that right? [288]

A. As a sergeant, yes, sir, not as an officer. We had a commissioned officer that was in command,

(Testimony of William Teague.)

Major Buchanan, of the Hawaiian Division Pack Train.

Q. Did he have any officers under him?

A. We had a Lieutenant Reed under him, was an executive officer.

Q. What?

A. Lieutenant Reed, a field artillery officer.

Q. And how many in this unit?

A. That was in the area.

Q. Yes, how many officers and men?

A. Including our officers and men it didn't exceed 75, including the two that was down on the beach, sir.

Q. And that unit was known as what?

A. The Hawaiian Division Pack Train.

The Court: Didn't have any cavalry?

The Witness: No, there was no cavalry, sir. We had three sections in the Hawaiian Division Pack Train. We had a horse section, a pack section, and also a wagon section. Our purpose in the horse section, we had our patrols. We also carried water cooled machine guns and light machine guns for protection of the train proper when we was working with the train. When I speak of the train was when we had the wagon section and pack section in the field.

Q. (By Mr. Deuel): Do you know where the McCandless [289] ranch house was?

A. Down in there, yes, sir.

Q. Was there a camp right opposite their house?

A. At the start they were on the beach there.

(Testimony of William Teague.)

They were living down there in pup tents. Later on there was a camp established in the pocket there.

Q. Were you in that camp that was established later on?

A. No, sir, I was not in the camp.

Q. Do you know how many officers and men were in that camp?

A. No, sir, I don't know how many men and officers were up in there later on.

Q. Was that part of this Hawaiian Division Pack Train?

A. No, sir, that was not. That was——

Q. Well, then, there were other troops there besides the Hawaiian Division?

A. At the start we were the only ones, sir.

Q. Well, can you tell us when the other troops came in?

A. The other troops came in there, as near as I remember, sometime in 1942, I would say the latter part of the fall, in there; as we got replacements from the States, why all units were built up.

Q. You don't know when they came in?

A. I don't know the exact date, no, sir.

Q. Sometime in the year 1942? [290]

A. Yes, sir, in the late part.

Q. And they roamed all over the whole place; is that right?

A. No, sir, they did not roam all over the place. Soldiers did not roam all over the place. They are supervised wherever they go.

Q. Can you give us some idea how many soldiers



(Testimony of William Teague.)

were down in that area in 1942 apart from your 75?

A. I don't know approximately how many men were in there at the present time. There were a small group. I would say that it would never exceed 40 men. That was from observations from the upper areas there, because we could look right down into that area from our observation posts. We had BAR positions up there on the ridges.

Q. You were looking from the top of the hill down at the troops in the valley?

A. Yes, sir, with glasses you can see the floor of the valley, with glasses, the same as you can look over this railing and see the floor down there, see all movements down in there.

Q. Now, you testified that you observed a fence which you believed had fallen into disrepair prior to the war?

A. I would say yes, sir.

Q. Was that fence on your patrol?

A. That was part of our area, yes, sir, down in through [291] there.

Q. Up on the ridge?

A. Where the fence was, sir, the lower part there.

Q. What area was that?

A. At the far end of the pocket from the seaward side.

Q. The patrol went all the way up that ridge, did it?

A. We covered all of that area in there, sir. That was part of our mission, to observe that whole area and make reports on it. When we first went

(Testimony of William Teague.)

in there, we knew not what was in that area. We were looking for radio stations primarily in there or enemy troops that had been landed in that area, because there is a rough area in through there and there is quite a possibility that enemy troops could have been landed and laying back in there. That was the purpose of our day patrols and also our night patrols in there.

Q. Did you ever see any cattle that were shot by troops?

A. No, sir, I have never seen any cattle that were shot in that area.

Q. Did you see any cattle that were shot at all, whether the shooting was done by troops or not?

A. I seen none killed in that area.

Q. You saw no dead cattle?

A. I seen none, no, sir.

Q. By the way, did you make reports of your observations? [292]

A. I made reports to the C.P. That was the command post.

Q. Where are those reports now?

A. Sir, I do not know where they are. I keep no record of reports.

Q. What did you do with them when you finished with them?

A. I sent all of my reports that went back to the C.P. by mounted messenger.

Q. To whom?

A. To who was in charge of the command post.

Q. You don't know where they are now?

(Testimony of William Teague.)

A. No, sir, I have no idea where they are. When you are on patrol, all you carry with you is a message book. You make out a message and report and send them back to command posts. You keep no record on you.

Q. Have you had any opportunity to refresh your recollection from your actual notes? You didn't find them?

A. I carry no notes.

Q. You made some messages?

A. They were sent back.

Q. What I am getting at, did you ever find those in preparation to come here and testify?

A. No, sir, I never have.

Q. Did you make any effort to look for [293] them?

A. No, sir, I wouldn't have the least idea where they could be at the present time.

Q. What were the names of the units that came to that area in 1942, apart from your unit?

A. They were the 21st and the 19th Infantry, sir.

Q. Twenty-first Infantry?

A. And the 19th, yes, sir.

Q. Did you notice any part of this area used for a bombing range?

A. Not at that time, there was none, sir.

Q. Was it used for any firing of any character?

A. There was supervised firing, yes, sir, because every day we would test our guns.

Q. Everything that is done in the Army is supervised, isn't it?

A. What I mean by supervised, sir, you just

(Testimony of William Teague.)

don't start firing just out into blank space or anything like that when you are testing a gun. You always have your safety precaution out before a gun is ever fired, sir, so you will not kill your own men if they are in the area.

Q. I am not saying there was indiscriminate shooting, Sergeant. Don't misunderstand me. Was there actual firing done?

A. There was firing, test firing of our guns, yes, sir.

Q. A great deal of it or very little? [294]

A. There was very little because we were conserving ammunition, sir.

Q. That is in the early part of 1942?

A. That's right, sir.

Q. But later on the 19th and 21st did get ammunition, did they not?

A. We had a little more liberal allowance of ammunition, but we didn't fire it, though, sir; we tried to conserve as much as we could because in those days every round was valuable, sir. We had very few of them and we was trying to protect an island here.

Q. What part of this land did the firing occur in?

A. We fired in the ocean, sir, and we fired into banks.

Q. What valley?

A. We fired in the Makua and we also fired on the ridges up there, sir. In the banks where we had our gun positions. Sometimes we would make

(Testimony of William Teague.)

a temporary placing of a gun so we could defend a trail or a certain portion, and we would test fire on it.

Q. Did that have any effect on the cattle?

A. No, sir, none that I could notice.

Q. Did they stay right there and watch it?

A. They didn't bother about it at all, sir. There was no wild stampedes of any kind or anything like you see in some of these Western movies and one thing and another, or [295] anything like that, sir.

Mr. Anthony: No further questions.

#### Redirect Examination

By Mr. Deuel:

Q. Just one further question, Sergeant, I intended to ask you. Did you at any time while you were there observe ranch personnel coming in; were they allowed access to round up some of these cattle?

A. There was parties that came up from the ranch down there. There were cowboys, and they had been passed before they came up there into our areas. The report was sent up to us of descriptions of men and how they would be mounted and how many there would be in the parties, and they had access to the cattle. They would come up there and talk with us as, you would say, one stock man to another, "Did you see any cows?" or anything like that. "Yes, I seen a little bunch over in the other gulch," or something like that, or where they was located. We tried always to work with them, and at times they would come up there and say they



(Testimony of William Teague.)

was going to take out some cattle, and they would take the cattle out.

Q. Did the troops or your group over there ever bother them?

A. They were never bothered, no, sir.

Q. They were allowed free access to come in and work the cattle? [296]

A. That's right, come in and work the cattle.

Q. And that happened on several occasions?

A. Yes, sir, there was quite a few occasions. They always came in. They had free access to the range lands up there and all of the area in there, and also to the stock. And we tried to help them as much as we could. As I say, we would tell them where we had seen bands of cattle.

Q. But they would have to have passes; otherwise they couldn't have access to the range?

A. They were passed to come up in there.

Q. On each occasion when they wanted to go for a herd of cattle?

A. We were always told that they were coming up in the area, yes, sir.

Q. On every occasion? A. Yes, sir.

Q. They didn't get one pass that was good for six months?

A. Well, sir, on the pass proposition I wouldn't say on that. We were passed by our officers to let them come into the areas and work their cattle.

Q. When these patrols were up there looking for the enemy that you have testified to, did they stick right to the trail? A. No, sir. [297]

(Testimony of William Teague.)

Q. They went right on through the whole area up there?

A. We went through the area. We were small patrols, sir.

Q. What happened when you would come to a fence?

A. When we come to a fence?

Q. Yes. You would cut right through it, wouldn't you?

A. No, sir, we cut no fences.

Q. How did you get through them?

A. There were no fences in the area where we were down in through there, sir.

Q. None at all?

A. There were broken fences, as I spoke about before, was all that was down in through that area, sir.

Mr. Deuel: No further questions.

Mr. Anthony: That is all.

### Examination

By the Court:

Q. There is an assumption in some testimony that there are still duds lying around through Makua Valley there; do you know how that could be accounted for, whether it is true or not, or just a supposition?

A. Later on there was artillery firing in there, sir.

Q. From the sea? Artillery firing from the sea?

A. Land artillery, sir. And as far as the duds or anything, sir, I wouldn't have no idea on that. That would [298] probably come under——

(Testimony of William Teague.)

Q. How much later on?

A. That was the later part of the war, up into 1944 and 1945.

Q. What was the purpose of the firing into the valley?      A. Training.

Q. Where were the guns located that were firing?

A. They would make temporary positions.

Q. What size guns?

A. They used 75's in there, and there was 105's used in there.

Q. And the purpose of that was merely for artillery practice?      A. That's right, sir.

Q. If they practiced artillery, they would have a definite target to shoot at?

A. That's right, sir.

Q. And that would likely be against some block or wall?

A. That's right, sir. It would be supervised firing with all the safety precautions.

Q. Well, if there were any duds, they would be largely in the target areas?

A. That's right, and they would be marked and everybody would be notified that that was a dud area and it was dangerous [299] to proceed through there.

The Court: All right.

(Witness excused.)

The Court: What more have you?

Mr. Deuel: Your Honor, that is the last wit-

ness I have at the present. I would like to make a motion, however, and there was one man spoken of early in the case by Mr. Anthony, Mr. Sebastian Rainy, ranch foreman out there at this time for McCandless. They had stated they intended to call him. I would also like to have him here. In fact, the record will show I issued a subpoena for him, but it was reported he is in the hospital at Pahala, Hawaii, with a broken leg at the present time. He is the man that I think probably would have more knowledge to help the Court more in this matter than anyone else, and I would like to make a motion that the decision be held up and there be a continuance until we can get him over here to testify. He should, I think, in the near future have his leg in a cast and be able to come over.

Mr. Anthony: We have no objection to that. We would like to have him ourselves. We have a couple of other witnesses, short witnesses.

The Court: How short?

Mr. Anthony: Well, I would say about an hour.

The Court: Half past one, or two? [300]

Mr. Deuel: Half past one or two o'clock?

The Court: Two o'clock.

(Thereupon, at 11:45 a.m. a recess was taken until 2 p.m. of the same day.)

\* \* \*

Afternoon Session, 2:00 P.M.

Mr. Anthony: Mr. Minami.

SUSUMU MINAMI

called as a witness on behalf of the Plaintiff, being first duly sworn, was examined and testified as follows:

The Clerk: Be seated.

Direct Examination

By Mr. Anthony:

Q. What is your name? A. Susumu——

The Court: This witness is put on in rebuttal?

Mr. Anthony: Yes.

A. (Continuing): Minami.

Q. (By Mr. Anthony): How old are you?

A. I am thirty-four.

Q. What business are you in?

A. I am in the hog business.

Q. How long have you been in that business?

A. About fifteen years.

Q. On the island of Oahu? A. Yes.

Q. Were you in that business during the war?

A. Yes.

Q. How many hogs do you buy or sell in the course of a year, approximately?

A. About two thousand head every time on hand.

Q. Every time what?

A. On hand, because we wholesale and retail.

Q. Two thousand a year?



(Testimony of Susumu Minami.)

A. Two thousand head on hand, we have on hand.

Q. And you are constantly buying and selling hogs? A. Yes.

Q. Is that right? A. That's right.

Q. Of all kinds?

A. All kinds. All kinds, sizes.

Q. Are you familiar with whether or not there was any OPA prices in existence in 1942 on hogs?

A. OPA came in in July 1, 1942.

Q. July, 1942? A. Yes.

Q. And what size hogs were regulated by OPA?

A. Above 175. [302]

Q. How about smaller than 175 pounds?

A. Smaller than 175 pounds there was no price set.

Q. Lower than that?

A. Higher than the OPA set price.

The Court: I don't get it. Do you mean there was not any special price set for hogs under that weight, that they just went along with the rest of them?

Mr. Anthony: There was no price fixed at that rate.

The Court: There was no special price fixed? They weren't given a higher price or lower one, but the same price was uniform throughout?

Mr. Anthony: No, they weren't regulated. I think that is his testimony.

The Court: I can't conceive that there was no price fixed on hogs if they fell just below 175

(Testimony of Susumu Minami.)

pounds, because many a 160-pound, 165-pound hog goes to market.

Mr. Anthony: That is what I understand the witness to say.

The Court: I don't get it. That is what I am trying to clear up.

Q. (By Mr. Anthony): Do you know what weight of hogs had an OPA price fixed?

A. About 175 pounds—above 175 pounds, because there was a shortage of live hogs. They set the weight of 175 pounds to be slaughtered, not less than 175 pounds. [303]

The Court: Couldn't be slaughtered?

The Witness: Yes.

The Court: Couldn't slaughter hogs under 175?

The Witness: Yes.

The Court: That threw all the luaus out of the window?

The Witness: Yes, that was stopped. Kalua pigs and Chinese roasting hogs were stopped altogether.

The Court: While there was no price fixed on hogs less than 175, they were forbidden to come into the market?

The Witness: Yes.

The Court: All right.

Q. (By Mr. Anthony): Now, can you tell us what the fair value at that time of a 50-pound hog would be out of a herd?

A. About 25 to 30 dollars.

(Testimony of Susumu Minami.)

Q. Twenty-five to thirty dollars? A. Yes.

Q. Each? A. Yes.

The Court: Well, what would a 175-pound hog be worth?

The Witness: One seventy-five would be about \$50.

The Court: What time are you talking about?

The Witness: '42, '42.

The Court: Right at the beginning of OPA?

The Witness: Yes.

The Court: Well, had the price of hogs run away in the meantime, the price of pork?

The Witness: No, the first part of 1942, the first six months of 1942 there was no OPA price. Well, the price was going higher and higher and less live hogs on this island. In June they were talking about OPA coming in and they set the price, and it came into effect July 1, 1942.

The Court: And what makes you put a higher value on a pig per pound of a pig weighing 50 pounds than you do on a pig or hog ready for the market?

The Witness: Well, everybody been buying small pigs to raise to be marketed, so they were paying bigger price, and less hogs, while the middleman or hog raisers were paying higher prices for that particular small hogs. There were more garbage for the pigs at that time.

The Court: What is the average weight of hogs that go to slaughter—at that time?

The Witness: About 250, 300 pounds, about

(Testimony of Susumu Minami.)

that. I have been keeping about 350 pounds. Smaller hog raisers, they used to keep smaller hogs.

The Court: Well, I didn't mean to carry on any cross-examination, but I want it cleared up as to what the [305] witness is testifying.

Q. (By Mr. Anthony): Was there a shortage of young pigs at that time?

A. Yes, because they were using for kaluas and roasting pigs, you know, Hawaiian style kaluas.

Q. Was there plenty of garbage available for feeding them?

A. Yes, there were plenty because all the soldiers used to camp here and there. They were buying hogs for feeding the pigs.

Mr. Anthony: No further questions.

### Examination

By the Court:

Q. About what is the weight of a pig, average, normal, at the time it is weaned from the sow to go on its own?

A. About thirty, thirty-five pounds.

Q. As heavy as that? A. Yes.

Q. Well, then, about how old would they be then? A. About three to four months.

Q. And about how old would they be at the time they increased their weight to 50 pounds, about a month?

A. Well, as soon as they are weaned, they lose weight.

Q. Yes.

(Testimony of Susumu Minami.)

A. It takes about another two months. [306]

Q. How long would it take to make up the next 15 pounds?      A. About two months.

Q. So that a 50-pound hog would be about five months old, four or five?

A. Well, some are fast growing and some slow growing.

Q. Do you breed hogs?      A. Yes, we do.

The Court: All right.

### Cross-Examination

By Mr. Deuel:

Q. Do I understand, Mr. Minami, that you were in the hog business back at the beginning of the war?      A. Yes.

Q. On this same question regarding the size or the age of a 50-pound hog, when you say that that would probably be five or six months old, are you talking about hogs which are raised such as you would raise them in a regular piggery—whatever the proper word is—where you keep them and feed them regularly, and so forth?

A. Well, at that time there were plenty of feed, swill; well, any place will grow as fast as my piggery or any other piggery.

Q. Supposing instead of being in a piggery and having all this swill that you are talking about the hogs, or pigs, were in an area such as one of the valleys around the island [307] here, a large area, where they weren't penned up and kept as you us-



ually keep them in a piggery, but just had freedom to roam all over the country there, and would come in and get some food that was put out to them each day; would those pigs grow as rapidly?

A. Well, they won't grow as much as—but——

Q. You stated, I believe, that OPA price control came in in July, 1942; is that your recollection?

A. Yes.

Q. Do you recall whether or not there were any other price regulations before that? Did the Army put some regulations in?

A. Well, I don't remember.

Q. You don't remember.

The Court: What was the price fixed by the OPA in July, 1942?

The Witness: I have that paper over there (indicating).

Mr. Anthony: Is this your memorandum? (Handing paper to witness.)

The Witness: Yes. One seventy-five and less, no set prices were set on that; 175 to about 240 pounds, 22 cents; 240 to 275 pounds, 21 cents; 275 to 300 pounds, 20 cents; 300 and over, about 18 to 19 cents.

The Court: How much did you say for 275 to 300? [308]

The Witness: Twenty cents.

The Court: Twenty cents. They come down, then?

The Witness: Yes, as the pigs get heavier, you pay less for them.

The Court: Over 300 pounds is what?

(Testimony of Susumu Minami.)

The Witness: About 18 to 19 cents, and sows——

The Court: That is a hog on its feet, is it?

The Witness: Yes, on the hoof.

The Court: Before it is dressed?

The Witness: Before it is dressed, on the hoof.

Q. (By Mr. Deuel): I understand you to say that the value, or price, of a 175-pound hog was 22 cents a pound? A. Yes.

Q. A minute ago you stated that a 175-pound hog was worth about \$60; is that what you said, 50 or 60 dollars?

A. Yes, about 50 or 60 dollars. That is the average.

Q. Well, if you multiply 175 pounds by 22 cents, don't you get \$38.50?

A. Well, 175 to 240 pounds.

Q. I am talking about a 175-pound hog.

A. Well, I was figuring as an average about that, when the OPA came in, but the first six months of 1942 they were paying higher price than this OPA price.

Q. But you said you didn't know whether there was any price control during that period or not.

Mr. Anthony: He didn't say that.

Mr. Deuel: I would like to read back his answer.

Mr. Anthony: He said there wasn't any price control.

Mr. Deuel: In response to my question he said he didn't know.

Mr. Anthony: No, your question was, Did the

(Testimony of Susumu Minami.)

Army put in any regulations; and he said he didn't know.

Mr. Deuel: That's right. I asked him if he knew whether or not there were any other regulations before OPA and he said he didn't know.

The Court: Did the Military Governor fix a price on pork and hogs?

The Witness: Not before the OPA.

The Court: Well, he didn't afterwards.

Mr. Anthony: Yes, he did afterwards, your Honor. That is the point. They appointed the OPA as the advisor to the Military Governor and the OPA would do the work and the General would put out the orders. I can show the Court the order, if you are interested in that.

The Court: I have a recollection of an order fixing the price, but I thought certainly it must have come before the OPA took charge under the law and authority of the Federal Government. You say it came after?

Mr. Anthony: Are you talking about the hogs alone, your Honor, or the general price fixing?

The Court: I was thinking about OPA as a general price fixer.

Mr. Anthony: The OPA on the Mainland, of course, came into existence shortly after the first War Powers Act, which was in March, I believe, of 1942.

The Court: Well, I remember there was some delay in getting it extended to the Territory here.

Mr. Anthony: That's right.

The Court: But I assumed that after the OPA

(Testimony of Susumu Minami.)

took charge of price fixing here that the Military Governor didn't bother with it any further.

Mr. Anthony: The first person who came down here was an administrator by the name of Carl Borders, and he was appointed by military order as price fixer and advisor to the Military.

The Court: Yes.

Mr. Anthony: I can get the date of that.

The Court: He was not official OPA, under the OPA set-up.

Mr. Anthony: Well, he was sent out here that way, but he didn't wind up that way when he got out here. When he got out here, he became an advisor to the Military Governor.

The Court: That is hard to digest.

Mr. Anthony: Well, I can show you the record. In [311] fact, I can step in the Clerk's Office and get it, I think.

The Court: Well, never mind.

Q. (By Mr. Deuel): Mr. Minami——

A. Yes.

Q. I believe you stated that you considered a 50-pound pig to be worth 25 to 30 dollars at that time; is that right, is that what you said?

A. The first six months of 1942.

Q. And then you state that a 175-pound to 250-pound hog, you took an average, was somewhere between 50 and 60 dollars?      A. Yes.

Q. Now, you are a pig raiser; could you afford to buy a 50-pound pig for 25 to 30 dollars and take care of it, feed it, and so forth, until it got up to

(Testimony of Susumu Minami.)

that average, in between 175 and 250 pounds, and sell it for 50 or 60 dollars?

A. Well, when the OPA came, we can't help it.

Q. I asked you whether you could afford to buy those pigs at that price and carry them up to the larger size.

A. Yes, we do, and we doing it now.

Q. Can you make money on that?

A. Well, sometimes we got to lose and sometime we got to make.

Q. How long does it take to raise a pig from 50 pounds up to 200 or 225 pounds? [312]

A. It takes about six or seven months.

Q. In other words, you have to at least double his age then? A. Yes.

The Court: You don't mean you are paying that much for 50-pound pigs now?

The Witness: Not as much as that. During the strike, yes, we used to pay.

Q. (By Mr. Deuel): Mr. Minami, when you speak of those pigs being worth the price that you stated, you are speaking of somebody's having them in a pen so you can go and get them there?

A. Yes, we buy from the other hog raisers.

Q. Or deliver them to you, either one?

A. Yes.

Q. Were you born and raised on this island?

A. Yes.

Q. You know the whole island fairly well, been around it? A. Yes.



(Testimony of Susumu Minami.)

Mr. Deuel: May I have the map, Joint Exhibit A. (Handed to counsel.)

Q. (By Mr. Deuel): I presume, then, that you know the northwest end of the island, somewhat up toward Kaena Point. Do you know where Makua Valley is, this area right here [313] (indicating)?

A. Yes, I think I do.

Q. Now, then, from your experience as a pig raiser, supposing that there were a number of pigs in this valley, ranging, various sizes, but an average of about 50 pounds, and they were not penned up here but they were running all over the valley, they were a domestic type pig and would come in to get food that was thrown to them, but they weren't kept enclosed and they had freedom to roam all over; supposing you were to consider those pigs, not as penned up so you could go pick them up or have them delivered to you, but had to round up those pigs yourself, what would you consider the value that way? It would cost you some money, wouldn't it, to round them up?

A. I don't pay extra for the rounding up of hogs.

Q. Would you pay the same price for them scattered all over the valley there with 2500 acres that you would if they were delivered right down in a pen to you—if you had to go out and catch each one of them?

A. Well, I won't pay, if I am going out and rounding up the pigs, but most of the hog raisers, they put altogether, and I look at the pigs.

(Testimony of Susumu Minami.)

Q. That is the basis on which you set your price?      A. Yes.

Q. That you estimate they are worth 25 or 30 dollars, [314] that you can go and get them from a pen?      A. Yes.

Q. That is what is usually done?      A. Yes.

Q. Now, I mean, if you had to go to all this trouble, they are out in this big area, you wouldn't pay as much for them, would you?      A. Yes.

The Court: Would you buy them sight unseen out in the woods or brush? Would you buy hogs that way?

The Witness: Well, I got to see before buying the pigs.

The Court: You would have to see every one of them?

The Witness: Yes.

The Court: At close quarters?

The Witness: Yes.

The Court: You don't buy hogs out running around all over the country?

The Witness: Well, I got to see the pigs.

The Court: What?

The Witness: I got to see the pigs before I buy.

The Court: Well, they generally bring them to you don't they?

The Witness: No, you go to the piggery.

The Court: Or you get them from a pen? [315]

The Witness: Yes.

The Court: Well, you don't know how much it

would cost to gather these pigs in and put them in a pen?

The Witness: No, I don't.

Mr. Anthony: No questions.

ADRIAN SILVA

called as a witness on behalf of the Plaintiff, being first duly sworn, was examined and testified as follows:

The Clerk: Sit down.

Direct Examination

By Mr. Anthony:

Q. What is your name? A. Adrian Silva.

Q. Silva? A. (Spelling) S-i-l-v-a.

Q. Are you a cowboy?

A. I used to be on a ranch. I do part time work for McCandless Ranch every time I have the chance.

Q. On this island, at Waianae?

A. That's right.

Q. How long did you work down there?

The Court: Where was your home?

The Witness: At Waianae.

The Court: Waianae Village?

The Witness: That's right. I live at Mailu.

The Court: I mean at the time you worked for McCandless.

The Witness: At Waianae.

Q. (By Mr. Anthony): Were you working for the McCandless Ranch after the blitz?

(Testimony of Adrian Silva.)

A. I was working at Pearl Harbor, but I used to go down there Saturdays and Sundays on my day off. I worked there before the war. I started when I was about ten years old fooling around with ranching.

Q. And were you down there frequently in 1942?      A. That's right.

Q. Did you see.

Mr. Anthony: Withdraw that.

Q. (By Mr. Anthony): What did you observe in regard to the fencing of the paddocks in that ranch?

A. What do you mean, before the war? Right before the war?

Q. Right before the war.

A. Well, they were all fenced off in paddocks.

Q. What valley are you referring to?

A. Makua, right in Makua Valley, up to the forest.

Q. And did the ranch operator have any difficulty in finding the cattle and getting cattle whenever they were needed?

A. No, because they were set in paddocks and when he [317] wanted them, they were there in the paddocks.

Q. How many paddocks was Makua divided into?

A. There were quite a few. There were some small ones, and—oh, I say five or six maybe. They were set off in different paddocks, see. There were some small paddocks and some big paddocks. On

(Testimony of Adrian Silva.)

the lower end we had small paddocks; on the upper end we had big paddocks.

Q. What happened to the fences on the McCandless Ranch after the outbreak of war?

A. Well, I noticed they were all torn down. Most of the fences are down.

Q. Did you see any troops there?

A. Yes, I did; tanks and everything.

Q. Did they have roads across the ranch?

A. We had one road leading up to the forest. During the war they made quite a few roads in there, across the valley.

Q. Who made the roads?

A. The Army did.

Q. And did the roads go right across the paddocks and through the fences?

A. Yes, that's right. We had one road up to Punapohaku, up to the forest side. We didn't have no road; all we had was a horse trail and they made a road up there that is going over to Kuaokala side.

Q. Can you state whether or not the Makua paddocks were [318] stock proof?

A. Yes, they were.

Q. That is just prior to the war?

A. That's right.

Q. Now, subsequent to the outbreak of war, what happened to those paddocks?

A. Most of them were torn down, fences all broken, tanks go through them, corrals were all broken.



(Testimony of Adrian Silva.)

Q. Do you know what was done with the corrals, the timbers in the corrals?

A. Well, they used most of the stuff for firewood.

Q. The soldiers did?                      A. That's right.

Q. Did you observe any firing in and about that ranch?

A. Makua, yes, there were quite a lot of firing, nearly every day of the week. They were bombing practice in Makua; planes were strafing the place.

Q. When was that?

A. During the war. I think it was 1942 on. I am not too sure on dates, but 1941, 1942 on submarines around there.

Q. Did this firing have any effect on the cattle?

A. Yes, sir, they did kill a lot of cattle in their bombs.

Q. Were the cattle frightened, or didn't they mind this [319] firing and shooting?

A. Oh, surely they were frightened.

Q. What would happen to them when the shooting would occur?

A. Well, when they were bombing and strafing the place, any cattle in the way would get killed.

Q. Did you ever observe the——

Mr. Anthony: Withdraw that.

Q. (By Mr. Anthony): Do you know whether there were any pigs on the McCandless Ranch?

A. Yes, there were.

Q. Were the pigs ever fed by the ranch hands?

(Testimony of Adrian Silva.)

A. Yes, they were fed.

Q. Where were they fed?

A. They had a corral and paddock there and feed them, call them in by a bell.

Q. What valley?

A. Right in Makua near the ranch house.

Q. And when this bell was rung, they would come in; is that right?

A. Yes, they would, that is right. Some of them were kept home in the corrals, in the pens there, some sows, some of them were kept home and some boars were kept home.

Q. You mean they were locked up?

A. Yes. [320]

Q. And couldn't get out? A. Yes.

Q. The great majority of them?

A. They were out and in the evening they were called in by a bell.

Q. And they were fed at night?

A. That's right, they were fed.

Q. Is that right? A. That's right.

Q. They were domestic pigs, were they?

A. They were domestic pigs, yes.

Q. Do you know what happened to those pigs?

A. I don't know what happened to them, scattered all over Makua.

Q. Do you know whether or not any of the soldiers disposed of them?

Mr. Deuel: Objection.

A. Well——

(Testimony of Adrian Silva.)

Mr. Deuel: Just a minute. The witness stated he didn't know what happened to the pigs.

The Witness: They scattered all over Makua. They got loose. Army got in there, see.

Q. (By Mr. Anthony): But you don't know what happened to the pigs?

A. No, I don't know what happened to the pigs. All [321] I know they got loose in Makua; that is all.

Mr. Anthony: No further questions.

#### Examination

By the Court:

Q. Who got loose, pigs or soldiers?

A. Pigs and soldiers, too.

Q. Well, the pigs were running loose, didn't you say?

A. They were in Makua. They took over the place. Pigs had no chance to come home. Everybody had to move out of Makua; so did the foreman who was taking care of the pigs.

Q. When did this happen?

A. Right during the war, right after the Army took over Makua.

Q. Were you living there at the time?

A. I was born and raised at Waianae.

Q. I know, but Waianae is quite a ways.

A. I go down in that district all the time.

Q. All the time; did you work there day after day?

(Testimony of Adrian Silva.)

A. Week-ends I used to go there. I know the condition of the place.

Cross-Examination

By Mr. Deuel:

Q. Mr. Silva, do you remember the dates quite well, right back in 1941 and 1942, when these various things happened?

A. No, I don't remember dates. [322]

Q. You are a little vague?

A. That's right. I know what happened, but I don't remember dates.

Q. You spoke of having seen a number of troops come in there? A. That's right.

Q. Isn't it true that when those troops came in was really late in 1942, that is, they didn't come in right at the beginning of the war, except a few along the beaches; isn't that right?

A. Well, I tell you, the day of the blitz they start moving on Waianae.

Q. I am talking about down in Makua, though.

A. All over the area, Makua and all.

Q. Were you down there at that time?

A. At Waianae, yes, I was.

Q. I am not talking about Waianae; I am talking about Makua.

A. I been there, yes, the same week.

Q. Weren't the troops just a few troops along the beach area?

A. Yes, scattered all over the beach.

Q. That is scattered around the beach, though;

(Testimony of Adrian Silva.)

there weren't very many troops there, were there?

A. I couldn't remember. [323]

Q. I mean right at the beginning.

A. Well, they were scattered all over.

Q. You are kind of vague as to when more activity came along there?

A. Well, each day that went by there were more there.

Q. But that was sometime later on, wasn't it?

A. Not much later on.

Q. You stated that some cattle were killed up there by some shooting? A. That's right.

Q. Were you up there, and actually see?

A. I tell you, we had permission, when they weren't firing, to ride up in that area.

Q. To go and get some out?

A. Ride up in there. Well, you can see them all over the place and you can smell them.

Q. You didn't actually see any shot?

A. Yes, you can see them.

Q. You didn't actually see any shot?

A. No, nobody can be in there but soldiers.

Q. I would like to refer you to the map which is here beside you, which is Joint Exhibit A. This is the Makua area shown here with the designation Lease No. 1740 written on it. Up at the Mauka end of it was the borderline between the McCandless Ranch area and the forest reserve. [324] Are you aware of that? A. Yes.

Q. And you knew there was a fence along there?

A. Yes.



(Testimony of Adrian Silva.)

Q. Isn't it a fact that that particular fence was not stock proof at the time the war started, that it was an old fence and stock could get through it, and there were cattle up in this forest reserve?

A. Well, I tell you, we drove in there before the war and there were no cattle in there. That fence was OK. We checked up that area there, all that area there. We used to work up this area and we used to hunt in there; no cattle.

Q. You didn't see any up in here (indicating)?

A. None in the forest reserve. That fence was OK.

Q. You said that the ranch area itself was broken into paddocks?

A. That's right.

Q. That was by a system of fences going across——

A. That's right.

Q. (Continuing): ——at right angles? And had that fence been entirely completed or were they in process of building?

A. It was all completed, had fences right across here (indicating). This is a ridge (indicating). Had a fence right across here (indicating). This is a forest fence here [325] (indicating). This is paddock, and this paddock, another paddock in here, another paddock in here, too. (Indicating.)

Mr. Deuel: I think that is all.

Mr. Anthony: Do you know the Sergeant who testified this morning?

The Witness: Yes, I met him up at Schofield stables.

(Testimony of Adrian Silva.)

Mr. Anthony: Did you ever see him down at Makua?

The Witness: Well, I tell you, I didn't know him then.

Mr. Anthony: No further questions.

### Examination

By the Court:

Q. You say they called the hogs in in the evening? A. That's right.

Q. And fed them? A. Yes.

Q. What did they feed them? A. Swill.

Q. Where did they get the swill?

A. Well, that part, I think he got it from around the camps around there, and were anxious to give them middling, mix it up with water and feed them up with that. The grain——

Q. What kind of grain?

A. I think it was barley, corn, and middling. I am pretty sure of that. [326]

Q. You never helped feed the pigs?

A. What was that? No, I never monkeyed with pigs. I worked with cattle.

Q. Every day they fed all the hogs that came in?

A. That is right. They had a big bell outside, and ring the bell.

Q. About how many hogs?

A. Well, I tell you, there were so many around we never bother to count. I never bother counting and I couldn't say.

Q. You couldn't estimate?

(Testimony of Adrian Silva.)

A. No, I never bothered with pigs. The cattle, maybe I could tell you that.

Q. Well, how many cattle were there up there?

A. Well, that part I couldn't say, too. I wouldn't say. There were so many in there we never count them. I say way over a thousand head or up maybe.

The Court: All right. I guess everybody is through with the witness.

Mr. Anthony: Excuse me, your Honor. We are finished with the witness. Thank you very much.

(Witness excused.)

Mr. Anthony: Mr. Marks, will you take the stand, please.

### ALFRED LESTER MARKS

recalled as a witness on behalf of the Plaintiff, having been previously duly sworn, was examined and testified further as follows:

#### Direct Examination

By Mr. Anthony:

Q. You have already been sworn, have you not, Mr. Marks?           A. I have.

Q. You heard the testimony of the Army fellow who testified in regard to improvements—No, he was a civilian employee of the War Department.

A. Civil engineer in the Army. Yes, I did.

Q. Relating to improvements placed on the McCandless property?           A. Yes.

(Testimony of Alfred Lester Marks.)

Q. Will you please explain that to the Court.

A. The improvements that were replaced were the houses of the employees and other facilities that had been located on the fee simple land of the McCandless Estate, and although we put in a request to move the house that we had been living in down on the beach——

Q. That is the house that was on the leasehold premises?

A. The house that was on the leasehold, we had negotiated for an exchange of that house for a similar house in Kona and the county of Hawaii had taken possession of the other [328] one. So, knowing that there would be no difficulty there, we included this permanent improvement on the leasehold in the list that we wanted moved. It was not moved, however, and the house was destroyed by bazooka practice; the other facilities were facilities that were put in in substitution for the facilities that we had on our fee simple land.

Q. What happened to that fee simple land ultimately?

A. That fee simple land was condemned under Civil 435, I think it was, and that was within the last two months concluded.

Q. And you reached a settlement for that condemnation by compromise, a compromise figure?

A. That is correct.

Q. In the process of that you included all items of improvements to real estate on that land; is that right?

A. I did.

(Testimony of Alfred Lester Marks.)

Q. That is, as far as your thinking was concerned?

A. In compiling the figure that they asked me to bring in, I took all of those matters into consideration.

Q. You had a substantially higher figure than that that the Government was willing to offer originally? A. We did.

Q. You finally reached a compromise, adjusted figure? A. We did.

Mr. Anthony: I think that is all. [329]

### Cross-Examination

By Mr. Deuel:

Q. Mr. Marks, with regard to improvements, in addition to those which were built in the Ohikilolo property, was there not also a house built here in town someplace by the Government for you on the McCandless Estate?

A. There was a small square house made out of canec that was put up at the McCandless residence to house the furniture and other facilities, that was our personal effects that were taken out of the McCandless, our house at the beach at Makua.

Q. That was in conjunction, then, with this whole deal down there? A. It was, yes.

Mr. Deuel: That is all.

Mr. Anthony: No further questions.

Mr. Deuel: Excuse me.

Q. (By Mr. Deuel): From your experience in contracting, and so forth, will you give us an esti-



(Testimony of Alfred Lester Marks.)

mate of the fair value of that house, or building, that was built here in town?

A. I would say that \$200 would be tops for it.

Q. Could you put that up for that?

A. I don't think I would put it up. This type of structure is a very temporary type. You can almost stick your elbow through the wall if you lean on it heavily. In [330] fact, most of the construction work that they did in substitution, they substituted a couple of water tanks for us that we have had to rebuild twice since they put those in at Ohikilolo, and the canec houses that were built have a life of not exceeding four or five years, so it is a little hard to evaluate a temporary structure that is put up under the exigencies of war.

Q. You did state, however, did you not, that in so far as the improvements which were put up there at Ohikilolo by the Government, that in making a hasty calculation, that in normal times you could have done it for roughly one half of a figure between 23 and 24 thousand dollars?

A. \$23,000 was the figure that was mentioned by one of the Congressmen and I told them that in normal times I could do it, I thought I could do it. That was just a curbstone estimate, not knowing the measurements or the amount of material that went into it, and I think that the testimony of the civilian employee who gave a cost of \$16,000 at the time, or a value of \$16,000, would represent a fair evaluation of what they put in.

Mr. Deuel: That is all.

Mr. Anthony: No further questions.

(Witness excused.)

Mr. Anthony: That is our case, your Honor. We rest.

Mr. Deuel: We have no rebuttal witnesses at this [331] time, your Honor, but I understand we are going to adjourn, or recess, until we can get Mr. Rainy.

The Court: Have you any idea how long that will take?

Mr. Deuel: I don't know whether Mr. Anthony wants to take care of it or whether he wants me to, but I have a letter from the doctor who is taking care of him and have his name. I can write to him and ask him what the earliest date he estimates will be that Mr. Rainy can travel.

Mr. Anthony: Your Honor, we are not particularly anxious one way or another. We did want to get him. We telephoned over for him. We are perfectly willing to use his testimony that he gave me for the House of Representatives, and we could close the case.

Mr. Deuel: I object to that, your Honor, for two reasons. First, in that hearing there was no representation there on the part of the Government, so his testimony is not subject to cross-examination. Secondly, his testimony in that case was very brief, and principally he merely corroborated and said that what Mr. Marks had said was true. I certainly don't see why the McCandless Estate, this man having been their foreman and man best in-

formed out there, would not be glad to have him here. All the Government wants to do is bring forth the true facts.

Mr. Anthony: We said we want him. We tried to get—— [332]

Mr. Deuel: The man has some information that I am sure will be helpful, your Honor. I have talked to him.

The Court: Then, not knowing when you can get the witness here, the Court is unable to set down a time.

Mr. Deuel: I can get off an air mail letter this afternoon and should have a reply——

The Court: As far as I am concerned, there is no immediate hurry or rush about it, but I was just going to mention that I can't set down a time for the continuation of the case. We will simply have to pass the thing until it is moved on by someone who has information as to when we can go ahead.

Mr. Anthony: Of course, that is not very satisfactory to us, to try this case and then sort of let it die a natural death. I don't see why Mr. Deuel hasn't made arrangements. I don't see why he can't do it between now and Monday and come in and tell the Court when the man can get down.

The Court: I understood from what Mr. Deuel said he had subpoenaed this witness, not knowing his incapacity, to be here, and I assume that that came as a surprise to him.

Mr. Anthony: We told Mr. Deuel.

The Court: He had a right to rely on the ful-

fillment of the subpoena. When did he go to the hospital?

Mr. Deuel: According to the letter that was in [333] my file, the doctor wrote back and said—I have it here. I will refer to it.

The Court: Do you know, Mr. Marks?

Mr. Marks: Approximately three weeks ago.

Mr. Deuel: This letter——

The Court: Just a moment. What was the extent of his injuries?

Mr. Marks: A badly injured ankle, as I recall it.

The Court: Fell off a horse, or what?

Mr. Marks: That is my—He is working up at Kapapala Ranch. He is no longer in our employ.

The Court: But you had word as to what had happened?

Mr. Marks: We sent to the Ranch there on the island of Hawaii to try to get him to come down.

The Court: I would assume in another two weeks or not more than three that we could have the witness here. That would be my off-hand idea, and as soon as we have information that we can have him here, I will be very glad to set the case down for the earliest hearing I can give it. I don't suppose it would take more than half a day unless he creates, by his testimony, something that either party would care to rebut, and that will be the end except the argument in the case. So I can give you a half day. I can make that most any time without interfering with some others.

Mr. Anthony: What I was going to suggest is



that [334] if he is in bed, perhaps we could take his deposition.

The Court: I had thought of that, but, of course, if the witness is available——

Mr. Anthony: That is the point. He is not available.

The Court: He will, presumably, be available within a short time and it would take a week or ten days to get his deposition.

Mr. Anthony: The doctor said three months.

Mr. Deuel: That is not correct, your Honor. The doctor said he might not be able to walk for two or three months, but, as your Honor knows, a man with a broken leg, or ankle, could get it into a cast and after a short period of time could get out of bed and could travel. A deposition, as you have already suggested, is not nearly as satisfactory, and, I repeat, I would think the McCandless Estate, this man having been their foreman, would be glad to have him.

The Court: That is beside the point.

Mr. Anthony: That is entirely beside the point. We want the thing cleared up.

Mr. Deuel: I tried to subpoena him.

Mr. Anthony: We tried to get him before you subpoenaed him.

The Court: Just so the case isn't continued without [335] day, I will continue it until, I will say, the afternoon of March 6, Monday, March 6.

Mr. Anthony: I will be in the Circuit Court of Appeals then, your Honor, in San Francisco.



The Court: Well, when will you be back from the Mainland?

Mr. Anthony: Shortly after that, the following week.

The Court: Can we make it a week later, March 10?

Mr. Anthony: That is entirely agreeable.

The Court: All right. Friday, March 10 at 2 o'clock. That is a tentative setting. The only reason I set it at that date is so as not to continue it without day, and that is subject to change upon any showing that we could finish the trial earlier than that time by mutual agreement, or at some date later.

Mr. Anthony: The understanding is that the case will be submitted on that day, either that or disposed of before that?

Mr. Deuel: I will, your Honor, write an air mail letter this afternoon to this doctor and ask him for a report as to when this man can travel.

The Court: Mr. Anthony, I am not so sure that I understood your comment that the case will be submitted on that date. What I meant to say was if it should happen that [336] that is a little too early, the man couldn't get here that day but could get here a very short time after, I am willing to continue it over until some subsequent date, not too far away.

Mr. Anthony: Mr. Deuel can find that out beforehand.

(Thereupon, at 3:00 p.m. an adjournment was taken until March 10 at 2 p.m.) [337]

## CERTIFICATE

I, Lucille Hallam, Official Reporter, United States District Court, District of Hawaii, Honolulu, T. H., do hereby certify that the foregoing is a true and correct transcript of my shorthand notes taken in Civil No. 886, A. Lester Marks, etc., Plaintiffs, vs. United States of America, Defendant, held February 14, 15, 16 and 17, 1950, before Hon. Delbert E. Metzger, Judge.

June 29, 1950.

/s/ LUCILLE HALLAM. [338]

April 3, 1950

The Clerk: Civil No. 886, A. Lester Marks and Bishop Trust Company versus United States of America, for further trial.

Mr. Deuel: We are proceeding, your Honor, this morning; as you recall, the Court had been adjourned to continue in order to get a witness from the outer island, but in view of the fact that he will be delayed, laid up for quite some time, we are proceeding without him and putting on some other witnesses. I will have a point of law to argue in a little while, your Honor, and it might save time if I could call Mr. Marks to the stand for just one point of clarification.

Mr. Anthony: We have no objection to Mr. Marks taking the stand now, if you want to.

Mr. Deuel: It doesn't make a bit of difference—we can't argue that point until the witnesses are on.

The Court: Go on with your witness.

Mr. Deuel: I will call Mr. Richardson.

GEORGE EDWARD RICHARDSON

a witness in behalf of the Defendant, being duly sworn, testified as follows:

Direct Examination

By Mr. Deuel:

Q. Mr. Richardson, will you state your full name, please?      A. George Edward Richardson.

Q. Your occupation and residence?

A. Oahu Sugar Company, village and ranch supervisor.

Q. Have you lived on the island or in the islands here for many years, Mr. Richardson?

A. Born and raised here.

Q. You have a general familiarity with the entire islands?

A. Well, not the entire islands, but Oahu. I am pretty familiar with Oahu.

Q. Particularly with the area up around Makua, where the McCandless ranch was up to the time of the war?      A. I have been out there.

Q. Will you tell us what your familiarity was with the McCandless ranch there at Makua and Kuaokala?

A. Well, I used to go out on weekends and go after wild cattle up in Kuaokala, the top of Makua there. They call it Makuakala. And I have been on several drives in Makua and we did some branding there while McCandless was alive.

(Testimony of George Edward Richardson.)

Q. And about what period of time was this? Was this before the war? [2\*]

A. I went out there since 1938.

Q. And then did you continue going out from time to time up until the war and afterwards?

A. Up to the time of the war and after the war.

Q. And you'd go out and work on these cattle roundups or drives, as you say?

A. On weekends, yes.

Q. And during that time, with your activities out there, did you become quite familiar with the ranch areas?

A. Well, not too familiar but I knew my way around.

Q. You were familiar, were you not, that there was a fence in the Makua area at the upper or mauka end of the area, dividing the Makua ranch from the Makua forest reserve? A. Yes.

Q. Can you state what condition that fence was in at the time the war broke out or just about that time?

A. Well, I would say that the fence was not too good. There was holes here and there. I think it was an old fence. It wasn't a new fence. It was an old fence.

Q. And about that period of time and before that, can you state whether or not there were McCandless cattle going back and forth through that fence and McCandless cattle up in the forest reserve? A. That's right.

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\* Page numbering appearing at top of page of original Reporter's Transcript of Record.

(Testimony of George Edward Richardson.)

Q. You saw them there yourself? [3]

A. Yes.

Q. And would you say there were quite a few cattle up in there?

A. Well, I couldn't say the amount of cattle but there were cattle in and out there.

Q. Scattered groups from time to time?

A. Well, we had to go and round them up in the valleys. Sometimes we would find them and sometimes we would not find them.

Q. During that period of time, of course, you were working with these cattle, and will you tell us what in general was the type of cattle they had out there? Were they high-class cattle or were they scrub cattle or what? How would you generally describe them?

A. Well, I would say that they were inbred.

Q. That was the general herd as a whole?

A. Yes.

Q. Do you know anything about whether or not there was some tuberculosis in the herd?

A. Yes.

Q. When you say "yes" you mean there was?

A. Yes.

Q. Did you observe whether or not among these cattle, particularly those up in the forest areas, whether any of them were unbranded or—— [4]

A. There were some unbranded cattle.

Q. Were those cattle easy to catch? Were they tame or wild or what?

A. No, they were outlaw cattle, I would say.



(Testimony of George Edward Richardson.)

You'd have to be a pretty good expert to catch them.

Q. You spoke of cattle up on the Kuaokala—or maybe I am not pronouncing it right. That is the plateau up about fifteen hundred feet, isn't it?

A. Yes.

Q. And they would catch cattle and bring them down from there from time to time?

Mr. Anthony: I object to that. It is nothing but leading questions here. I think the witness ought to testify what he knows and not have Mr. Deuel do it.

The Court: The question is leading.

Q. (By Mr. Deuel): Will you tell us with regard to cattle up there, how they would go about getting them down from—you said you rounded up cattle and herded them in. How would they go about getting them down from Kuaokala?

A. We took tame oxen up with us from the ranch. There was a small corral. We'd lead these small oxen in the corral and we'd go up for the unbranded cattle. There was some cattle branded, the older cows and some older steers. They were branded. But we went after the cattle that were not [5] branded, and these were wild cattle. We'd get them and tie them to a tree and leave them there for a Sunday, and the next day they would bring them down. They didn't want to bring them down right away because it was tough on the oxen. They tied them up to a tree and brought them down the next day.

(Testimony of George Edward Richardson.)

Q. How would they go about it?

A. Tie a wild bull or wild cow to this tame ox and the ox would bring them down.

Q. Would you say that was easy or not easy a way?

A. We'd call that big game. That was pretty big game. You go out after something wild, and we enjoyed that sport and we ran after the wild cattle.

Q. Well, that method of getting cattle down, was that an economic or was it an expensive method?

A. Well, when McCandless was alive I don't think McCandless minded the expense. We used to go down, between twenty-five and twenty-six of us, go down and sleep Saturday night and McCandless would feed us and go early in the morning. One Sunday we may catch none or ten the next Sunday. That's the way it went from Sunday to Sunday.

Q. After the war broke out, Mr. Richardson, did you still continue at times to go up there or not?

A. The war broke out in '41. I think in '42 I didn't go there any too much because there's too much Army and [6] things were pretty bad to travel back and forth those days. I didn't go too much in '42. But I do think I went down in '43.

Q. '43?

A. Yes. It was pretty hard traveling in those days when the Army was here. Everything was hot around here. We didn't go down too much.

(Testimony of George Edward Richardson.)

Q. That is, traveling around that section of the island? A. Yes.

Q. You say that you did go down, you think it was along about '43?

A. If I recollect my mind I think it was around '43.

Q. What was the purpose of going down there at that time—the same as before? A. Yes.

Q. You mean by that, to get cattle out?

A. Yes.

Q. On those occasions were you interfered with by the Army?

A. Oh, yes. We were chased out a couple of times.

Q. Out where?

A. Well, we couldn't go up to the Kuaokala unless we went along with the foreman. It was pretty tough around there. [7]

Q. You did, though, go with the foreman from time to time?

A. After awhile we used to go to the PX, after we got acquainted, and go to the PX and drink beer.

Mr. Deuel: I think that's all.

#### Cross-Examination

By Mr. Anthony:

Q. Where was the PX?

A. Right in Makua, in Keaau. Everything was out at Makua, and they had them in Keaau.

(Testimony of George Edward Richardson.)

Q. There were a good many troops around there, weren't there? A. Very much so.

Q. They had taken over the ranch, more or less?

A. They took over Makua valley.

Q. And can you give the Court any idea how many men were stationed around in that area, in the McCandless ranch? A. You mean Army?

Q. Yes.

A. They were all camped in the kiawe trees, maybe five hundred or a thousand. I don't think I can give you the exact figure.

Mr. Deuel: I think we ought to have the period of time.

Mr. Anthony: After the war broke out? [8]

The Witness: Yes.

Mr. Deuel: What particular period? Because we have a difference here as to whether it is immediately after or later, because it is acknowledged that the Army took over.

Mr. Anthony: Mr. Deuel can take that up on re-direct, if he wants to.

The Court: Well, nevertheless he has the right to insist that you have the time specified.

Mr. Anthony: It was after the war broke out.

The Court: I know, but that is rather vague, "the war broke out."

Mr. Anthony: The war broke out in December, '41, and after the war broke out this witness said he was there, on his direct examination, a little bit in '42 and more frequently in '43.

Q. (By Mr. Anthony): Now, these troops you

(Testimony of George Edward Richardson.)

are talking about referred to what time, Mr. Richardson, the Army troops?

A. Well, I didn't go much in '42 because, as I say, we couldn't travel around too much. Everything was guards here and guards there. But in '43 things got a little more loose and I used to go up more often in '43.

Q. When you did go down there in '42, can you give us any idea how many troops were around there, even though you weren't permitted to move about freely? [9]

A. Well, they were all in the kiawe trees all the way along from Waianae to Makua.

Q. And you don't know how many troops there were?

A. No, sir.

Q. They were all over the place?

A. Yes.

Q. The same was true in 1943?

A. Yes.

Q. Now, you testified as to the wild cattle that were up in the forest reserve and on Kuaokala. Were all of them cattle of the McCandless ranch, on the McCandless ranch, wild cattle, or was that just a few that were up there in the upper reaches?

A. Well, there's a fence up there. They call this fence the Dillingham fence. And we didn't go into the Dillingham place to catch the cattle. We only stayed in what was called the McCandless place.

Q. Well, were most of the cattle on the McCandless ranch wild cattle or were just a few of them wild cattle?

A. Well, all the ones that were unbranded—and there were some bulls up there that I would say



(Testimony of George Edward Richardson.)  
would be about ten years old—I figured they were wild cattle, born up there but nobody had corraled them.

Q. Now, were there any pure breds on the McCandless ranch? [10]

A. I know of some Aberdeen Angus that were down below in the kiawes, black cattle. I thought that they were more of the pure bred cattle.

Q. And they were pretty good cattle, were they?

A. Yes.

Q. Did you see any white faces in Makua?

A. Well, yes, there was a few white faces.

Q. What do you mean by white faces?

A. Well, all of the Hereford cattle is white face. But I don't think they were the pure Hereford cattle. There may have been some cross in the breed of Hereford with some other breed.

Q. Now, Mr. Deuel asked you whether you had any information in regard to tuberculosis, and you answered Yes. What do you mean by that, Mr. Richardson?

A. Well, Rainy stated that the cattle were affected by tuberculosis.

Mr. Anthony: I object to that as hearsay.

The Court: That may be stricken as hearsay.

Q. (By Mr. Anthony): Is your information as to tuberculosis based upon your own knowledge, Mr. Richardson?

A. All those cattle were inspected by the Territorial veterinarians, and those that were affected were separated.

(Testimony of George Edward Richardson.)

Q. And your reference to tuberculosis is based upon [11] that inspection and what Mr. Rainy told you, is that right? A. Yes.

Q. You didn't make any inspection yourself?

A. No.

Q. You are the ranch supervisor out at Oahu, are you? A. Yes.

Q. Can you give us an estimate as to the value of cattle per head such as the McCandless cattle in the years 1941 to 1944?

Mr. Deuel: Your Honor, I think that question is rather indefinite for the reason that what we are concerned with here is not a value as to cattle, say, delivered to market or herded up in the corral or what. We haven't found out what he is referring to. It stands obvious in this case that what we are concerned with in this valuation is cattle as existed in the entire ranch in the condition they were in. He is asking a question which will probably lead to an answer of cattle delivered to market or at least delivered to a corral rather than picked up.

Q. (By Mr. Anthony): Assuming cattle were in a corral out there at Makua, would a hundred dollars a head be a fair price for such cattle?

A. Well, I am a salesman myself. In selling an animal it all depends what you want for that animal, in selling an [12] animal. If I figure my animal is worth one hundred fifty dollars, I am going to ask one hundred fifty dollars for my animal. And if the buyer does not give me that price, I wouldn't sell my animal. It may be off the record. Frequently

(Testimony of George Edward Richardson.)

I see the manager of the Waianae plantation there, and he came up there once and I had some of my own cattle and he wanted to give me seven cents on the hoof. I told him I wasn't broke yet. Seven cents on the hoof is a cheap price.

Q. What is the average weight of the steer?

A. It always depends how old your steer is and what kind of paddocks you have.

Q. And you set the price?

A. Of course in the stock market they have a scale for your price, but some people don't go by the scales. They have been selling black market here, all kinds of prices for cattle.

Q. Well, would you say a hundred dollars a head was a fair price for the McCandless cattle average?

Mr. Deuel: Objection. This particular line of questioning is not proper cross-examination here. If he is making him his own witness, why, he is definitely asking him leading questions.

The Court: Well, I think it is outside of the range of the direct, of the cross. Of course, you can make the [13] witness your witness.

Mr. Anthony: Well, I'd like to make him my witness. The man is here on the witness stand, your Honor. If he knows anything about it, I'd like to have the Court have that information.

The Court: Yes.

Mr. Anthony: I'd like to ask him the question as my witness.

The Court: All right. As your witness, you may go ahead.

(Testimony of George Edward Richardson.)

Mr. Anthony: Mr. Richardson, will you answer the question?

Mr. Deuel: My objection still stands, your Honor. Mr. Anthony suggested the price to him there. I think if he wants——

The Court: Well, why didn't you object to that? It was leading anyway.

Q. (By Mr. Anthony): What would you say is a fair average price for McCandless cattle during this period we are talking about, Mr. Richardson?

A. Well, you want to put it at that time?

Q. Yes.

A. Cattle has jumped up double since then. I don't know. Maybe I would ask one hundred twenty-five a head. [14] I mean it is up to the individual what their——

Q. I'm not asking you what you'd ask. I am asking you what were cattle selling for then.

Mr. Deuel: Your Honor, I don't believe that Mr. Anthony has properly qualified the witness for this line of questioning as yet. He assumes that he knows the market as a whole. And for that matter, he didn't definitely relate it back to the time which I am assuming that he means, to 194——

Mr. Anthony: Well, I will withdraw the question. Let's get on with the case.

Q. (By Mr. Anthony): Have you ever roped any bulls out there? A. Yes.

Q. And were they good, strong bulls?

A. Yes.

(Testimony of George Edward Richardson.)

Q. How many cowboys were required to rope one of those?

A. To have nobody get hurt would put three or four ropes on one bull.

Q. Now, on the McCandless ranch how many ropes did you have when you were roping a bull?

A. I am talking about the McCandless ranch.

Q. So those bulls were pretty good, were they?

A. Yes. [15]

Q. Can you give us any idea how often you went out there, Mr. Richardson? Was it every week?

A. I would say it was twice a month.

Q. Twice a month? A. Yes.

Q. And that was during——

A. '38, '39, '40.

Q. Then in '42—'41? A. Early '41.

Q. In '42 approximately how many times did you go out there?

A. I don't know whether I went out once or twice in '42.

Q. And in '43 how many times?

A. Well, I would say once a month, maybe once a month in '43.

Q. Mr. Richardson, were you familiar with the fact that there was fencing done in Makua valley in the latter part of 1941? A. Yes,——

Q. In other words,——

A. ——early part of '41 up to the latter, that's right.

Q. The testimony thus far is, towards the latter part of '41. [16] A. Yes, yes.



(Testimony of George Edward Richardson.)

Q. Now, that would prevent the cattle, if those fences hadn't been broken, from getting up into the forest reserve, would it not?

A. I believe that is a new set-up they planned there. There was no fences in there in Makua, but they were going to improve the place and make four paddocks, and one fence went straight from the ocean up to the mountains. I am not too sure whether the side fences were all through, but I know the main fence going up was through. It could have been through while I didn't go there.

Q. And when you were talking about the holes in the fence, you were referring to the period before the war, were you not?

A. Well, that's the old fence, forest fence. This is the forest fence I am talking about with the holes in it.

The Court: Well, that forest fence, was it made over or wasn't it?

The Witness: I am not—I don't think so. There was holes in there, and they could have fixed it. I am not too familiar with that.

The Court: Well, that was rebuilt at the time you were talking about the fences being built?

The Witness: This fence in Makua, that's a new fence. [17] There was no fence there. They made this new fence.

The Court: Well, that had nothing to do with the forest reserve fence?

The Witness: No.

The Court: Well, on these cross-fences to the

(Testimony of George Edward Richardson.)

valley, did they have anything to do with the forest reserve?

The Witness: Well, they could catch their cattle and put it below this cross-section fence from the forest.

The Court: Considerable vacant pasture, then, between the cross section fence and the forest reserve, wouldn't there be?

The Witness: Yes.

The Court: Well, would that have been any plan, to leave a space in there that wasn't being used?

The Witness: I think that was a good idea, to have four paddocks there. They had one open space as it was.

The Court: Well, the mauka paddock would have been bordered on the mauka side by the forest reserve fence?

The Witness: Yes.

The Court: And you say it was in poor condition the last time you saw it, is that so?

The Witness: Yes.

The Court: All right.

Mr. Anthony: No further questions.

### Redirect Examination

By Mr. Deuel:

Q. That area that you are speaking of now, is along from Waianae to Maku in the kiawe trees, is that the way you put it, I believe? A. Yes.

Q. Mr. Richardson, you spoke of troops being

(Testimony of George Edward Richardson.)

that close down towards the beach or does it run 'way back into the hills?

A. Along Makua beach and Keaau beach is all kiawe trees on both sides of the road, and the Army was all down below because we couldn't go on top.

Q. What you are talking about, then, is—and relating back to the early days of the war—is that the troops were in the areas near the beach, concentrated there? A. Yes.

Mr. Deuel: I think that's all.

#### Recross-Examination

By Mr. Anthony:

Q. You also saw them there in '43, didn't you?

A. Yes.

Q. You saw them up on Kuaokala, didn't you?

A. There was an Army camp built in one of the gulches on top of Kuaokala. They were all—I don't know what you call them—fox holes. We had to be careful with our cattle when we ran up there with our horses. [19]

Mr. Anthony: That's all.

Mr. Deuel: That's all.

(Witness excused.)

Mr. Deuel: Call Mr. Yim.

WILLIAM F. YIM

a witness in behalf of the Defendant, being duly sworn, testified as follows:

Direct Examination

By Mr. Deuel:

Q. Will you please state your full name?

A. William F. Yim, Y-i-m.

Q. And your occupation and residence?

A. Post Office clerk. I live at 529 Panui Street.

Q. And how long have you lived on this island or in the islands?

A. Well, since I was born to this day on this island.

Q. On this island? A. Yes, sir.

Q. Mr. Yim, have you had some familiarity with cattle and stock? A. A little, yes, sir.

Q. Have you had familiarity with them on the McCandless ranch? You know the McCandless ranch area out at Makua and Kuaokala?

A. Yes, sir. [20]

Q. And did you have familiarity with that area?

A. Yes, sir.

Q. During what period of time?

A. Well, before the war, about 1938 until the war broke out, and we were laid off about a year and one-half and then I went down afterwards.

Q. What did you do out there?

Mr. Anthony: I object to it unless the time is fixed.

Mr. Deuel: I am very happy to have him go

(Testimony of William F. Yim.)

into it. I thought he did say from 1938 on through until after the war broke out.

Mr. Anthony: Well, I object to anything he did prior to the time when the Army took over. That is of no relevance to any issue in this case.

Mr. Deuel: It definitely shows his familiarity with this particular area and with the animals and stock out there and the conditions of the ranch, your Honor. It is in the nature of qualifying him.

The Court: All right. Go ahead.

Q. (By Mr. Deuel): Will you state what you did out there on the ranch and over this period of time from 1938 until up to the war and afterwards?

Mr. Anthony: I object to that as duplicity now. Let's find out when. He can't do all the things at this time. [21] That's about six questions in one. He can ask him if he was out there in 1938 and what he did.

Q. (By Mr. Deuel): Were you in this area of the McCandless ranch in 1938, Mr. Yim?

A. Yes, sir.

Q. And will you tell us what you did out there at that time?

A. Well, I had no particular duties. I just went out there for the sport, cow-punching.

Q. How often did you go out in 1938?

A. Practically every Sunday or every other Sunday. Practically every Sunday.

Q. And what did you do while you were out there on these Sundays in the times you were out there?

A. I was a brush popper.



(Testimony of William F. Yim.)

Q. And were you in these same areas in the year 1939, Mr. Yim?      A. Yes, sir.

Q. And about how often did you go out in 1939?

A. Every weekend.

Q. And what did you do out there in 1939?

A. Same thing. Sometimes we had to repair fences, branding cattle.

Q. Drove cattle and repaired fences? [22]

A. Yes.

Q. And did you go out there to this area, in these areas, in 1940?      A. Yes, sir.

Q. And about how often in 1940?

A. Every weekend.

Q. And what were you doing out on those occasions?

A. Same thing, branding, chasing wild cattle.

Q. And were you familiar, did you go out to those areas in 1941?

A. Until the war started, yes, sir.

Q. Until the war started?      A. Yes.

Q. And about how often?

A. Same, every weekend.

Q. And what were you doing on those occasions?

A. Same thing.

Q. And during this period of time that you have spoken of, did you become quite familiar with the various, the general ranch areas out there?

A. Quite, yes, sir.

Q. Were you from this experience, Mr. Yim, familiar with the fence in the Makua area in the

(Testimony of William F. Yim.)

Makua portion thereof dividing the Makua ranch from the Makua forest reserve?

A. Yes, sir. [23]

Q. And will you state from that familiarity what was the condition of that fence prior to the war and at the outbreak of the war? You are talking about Makua ranch—right?—right in Makua?

A. I am.

Q. I am talking about Makua.

A. There were a few holes there, some pukas.

Q. What was its condition with regard to being stockproof?

A. Oh, cattle can easily go back and forth.

Q. And did cattle go back and forth?

A. I think so. I think so. I think I see hoof marks going over.

Q. What I am getting at is, did you observe cattle from the McCandless estate that were on the Makua forest reserve and had gone through that fence?

A. We had to chase them back.

Q. Did you drive them up in there at various times?

A. We didn't go to the same area every time we went down there.

Q. You say you didn't go in the same area?

A. No.

Q. But what I am getting at is that whether or not you observed cattle up in there, cattle of the McCandless estate, shortly before or about the time the war broke out [24] in the Makua forest reserve?

Mr. Anthony: I object to the continual leading.

(Testimony of William F. Yim.)

There hasn't been a single question but putting words in the witness' mouth. Why doesn't he ask him what he observed instead of Mr. Deuel——

The Court: Reframe it.

Q. (By Mr. Deuel): At these times in 1941 up to about the time of the war, did you observe cattle of the McCandless estate on the Makua ranch?

A. Yes, sir.

Q. And with regard to the location in and about the fence, what did you observe in regard to these cattle?

A. I don't quite understand the question.

Q. You have stated that the fence itself that we are talking about——

A. Makua fence?

Q. Yes, the Makua fence, that is, between the Makua ranch and the forest reserve, had pukas in it, I believe you stated.

Mr. Anthony: He said they had a few holes.

Q. (By Mr. Deuel): What I want to know is what you observed with regard to the cattle in about that fence?

A. Well, when we went up after the cattle we had to [25] go through the holes and try to brush them, find them in the forest range area and drive them back.

Q. You had to drive cattle back from where?

A. The forest range.

Q. From the forest area?                      A. Yes, sir.

Q. And did that happen many occasions?

A. Three, two or three times, yes, sir.

(Testimony of William F. Yim.)

Mr. Anthony: What was that last answer?

The Witness: Two or three times.

The Court: What year are you talking about now?

Mr. Anthony: What year, the Judge asked you?

The Witness: '41.

Q. (By Mr. Deuel): From your working with the cattle out there, Mr. Yim, can you tell us what in general was the type of cattle that were on the McCandless ranch? How would you describe them?

A. We call them scrub cattle.

Q. And did that refer to the cattle as a whole?

A. Yes, sir.

Mr. Anthony: I move to strike the witness' answer, your Honor, so that I can make my objection. He has no qualifications to give any opinion as to what these cattle are, on his own statements. [26]

The Court: Well, he said they called them scrub cattle.

Mr. Anthony: He said "we call them."

The Court: You might find out from the witness what other cattle, type of cattle, he is acquainted with.

Q. (By Mr. Deuel): Will you tell us, Mr. Yim, what in general, what familiarity you have had with cattle? Have you had familiarity with cattle other than these McCandless cattle? Did you ever do any work on cattle ranches or around cattle before this?

A. No, never worked in a cattle ranch before. But I had my own.

(Testimony of William F. Yim.)

Q. You had your own?

A. I had my own cattle when I was in Hawaii.

Q. Do you consider that you have had some familiarity with cattle over a period of years?

A. From going down there that often, yes, sir.

The Court: Say it over again.

A. From going down that often, yes, sir.

Q. Have you worked with cattle enough to know various types of cattle?

A. Not enough, no, sir, not enough.

The Court: Where did you say you had worked elsewhere in a ranch with cattle?

The Witness: I didn't say I worked in any ranch at all. [27] I said I had my own cattle when I was in Hawaii.

The Court: Where?

The Witness: On the Island of Hawaii, Kona District.

The Court: How many cattle did you have?

The Witness: Milking cattle, four cows.

The Court: You have seen the cattle on Parker ranch?

The Witness: Oh, yes, sir.

The Court: Have you seen them on the old Norris ranch?

The Witness: No.

The Court: Have you seen them in the McCandless ranch in Kona?

The Witness: No, sir, I have never been to that ranch. I saw milking cattle down in——



(Testimony of William F. Yim.)

The Court: Have you seen them in the McGuire ranch?

The Witness: Yes, sir.

The Court: On the old Frank Woods ranch?

The Witness: I don't remember that.

The Court: Well, Kahua ranch.

The Witness: Yes, sir.

The Court: Have you seen them on Shipman's ranch?

The Witness: No, sir.

Mr. Anthony: I can't hear what he says, your Honor.

The Court: He said "No, sir" to the last statement. All right. [28]

Q. (By Mr. Deuel): How would you say that these cattle on the McCandless ranch, Mr. Yim, compare with other cattle that you have observed?

Mr. Anthony: I object to that. That is an expert question. He doesn't know anything about cattle. He had four milk cows in Hawaii. It is not relevant anyhow to the issue in this case. He just knows about the McCandless—he has to know about the McCandless——

The Court: Well, he hasn't qualified as an expert, but he has testified that "we call these scrub cattle." Go ahead.

Mr. Deuel: Are you allowing him to answer the question, your Honor?

The Court: What?

Mr. Deuel: Are you allowing him to answer?

(Testimony of William F. Yim.)

The Court: May I have that question?

(The reporter read the last question.)

The Court: No, that is sustained.

Q. (By Mr. Deuel): Mr. Yim, with regard to the cattle that you went out to round up on these areas, how in general would you describe those cattle? A. They are quite wild, sir.

Q. And how were they with regard to being branded? Were they branded or not? [29]

A. Some of them were. Some of them weren't.

Q. And are you familiar with the method of getting cattle down from the Kuaokala area?

A. The wild cattle, yes, sir.

Q. And how was that done?

A. Well, we had a bunch of work oxen which we used to drive ahead of us on the way up the trail. And we had the paddock—corral we called it—and kept them in until—well, if a wild bull was caught we'd take one of these work oxen to the bull and tied them, necks, together, and we let the work oxen take the wild one back to the home ranch.

Q. Mr. Yim, in your experiences working in the McCandless ranch, did you ever have occasion to work on one of their ranches at Waianae, right near Pokai bay adjoining Lualualei?

A. Yes, sir, I worked all the ranches.

Q. You worked there, you say, also?

A. Yes, sir.

Q. And did you work there in 1941? Were you out there in 1941?

(Testimony of William F. Yim.)

A. I cannot safely say whether it was '41 or '40. We didn't go there all the time.

Q. You can't quite remember whether you were out there in '41 or not? A. No, sir. [30]

Mr. Deuel: That's all.

### Cross-Examination

By Mr. Anthony:

Q. You went out there as a visitor, didn't you, as a guest?

A. Well, I went down there helping, helping, just to help.

Q. As a guest, weren't you? Did you get paid?

A. No, sir.

Q. You just went out there for fun, didn't you?

A. That's right.

Mr. Anthony: No further questions.

Mr. Deuel: That's all, Mr. Yim.

(Witness excused.)

Mr. Deuel: Your Honor, I see that Mr. Clarke is here now. If we might call Mr. Marks and then Mr. Clarke on this other point——

The Court: All right.

Mr. Anthony: Just a minute. I see that Mr. Clarke is right here now. Your Honor can take his testimony and then he can go back to his office.

JOHN K. CLARKE

a witness in behalf of the Plaintiffs, having previously been sworn, resumed and testified further as follows: [31]

Redirect Examination

Mr. Anthony: You have already been sworn in this case, have you not?

The Witness: Yes.

The Court: I don't recall that he appeared in the case before.

Mr. Anthony: Yes, he did.

Mr. Deuel: Yes, he did, your Honor.

The Court: All right.

Q. (By Mr. Anthony): You have already testified to your familiarity with the McCandless ranch over a great many years? A. Yes.

Q. And I believe you testified as to the value of that ranch land comprising the McCandless ranch?

A. I did.

Q. As of 1942 to '43 and '44?

A. That's right.

Q. You recall what your opinion was as to the value per acre?

A. I believe that the value of three dollars an acre would be a fair figure for it.

Q. And there are some 4,783 acres. That would be approximately \$14,450? A. That's correct.

Q. Would a willing buyer pay that amount for a lease of a short duration like that, in your opinion? A. I believe he would.

(Testimony of John K. Clarke.)

Q. You are quite familiar with ranch properties apart from the McCandless ranch, are you not?

A. I am.

Q. For many years you were connected with the Hind ranch? A. Yes, sir.

Q. That is one of the larger ranches on the Island of Hawaii? A. That's correct.

Mr. Anthony: You may cross-examine.

Mr. Deuel: Your Honor, what I had intended to bring out by recalling Mr. Clarke I believe has been brought out, namely, that he bases his opinion of values on conditions throughout the period of time during the continuation of the 5-year remainder of the term for which it is contended that this lease ran. That being the fact, and his opinion being based not on values at the date of entry, in other words, late 1941, early '42, but on the continuing and changing conditions throughout '42, '43, '44, '45 and '46, I move that his opinion of value be stricken. And in that regard, your Honor, I'd like to cite to you some cases of the Court of Claims in similar matters definitely holding [33] on that point.

Mr. Anthony: Well, your Honor, before we get into any discussion like that,—I think we are dealing with tweedle-dum and tweedle-dee—let me ask the witness some further questions. I don't see any confusion that is conjured up but I think I can meet whatever objection he has by asking the witness further questions, if I may, your Honor.

The Court: Well, start over again.

Q. (By Mr. Anthony): Mr. Clarke, you have



(Testimony of John K. Clarke.)

an opinion as to the value of that leasehold as of December 7, 1941, have you not?

A. Yes, it was worth that money then.

Q. It was worth what?

A. Three dollars an acre, approximately \$14,450.

Q. And that was for the entire remainder of the term?

A. Yes, sir.

Q. As of that date that is the value of that leasehold?

A. Yes, sir.

The Court: Well, had it been worth that year by year preceding that?

The Witness: Of course, there was a change in the cattle business up to that time, and we are receiving a great deal more for a bull than we did previously. There [34] is another factor there. The McCandless estate has quite a little in private holdings. They have other adjacent lands. By combining them, naturally the expense of operation is very much less. Take the cowboy situation alone. It doesn't require so many men. So I believe that area to be worth three dollars an acre, if it had been fenced properly and had been able to rest the various areas it would be worth that money to anybody.

The Court: And to anyone who had cattle?

The Witness: That's right. And they had it.

The Court: Now, when would that be? The testimony shows that it is worth not the next day, the next few days after Pearl Harbor—the Army went in there, a small number to begin with, but there was testimony that they broke down fences and made roads in there to gain access to other

(Testimony of John K. Clarke.)

places and they did some fortifying. Now, without regard to these operations of the Army but just assuming that the Army hadn't gone in there on that day, what, at that time, would have been in your opinion a fair market value of the leasehold, considering that it had only five years to run, and considering that there were improvements there at that time, if you are familiar with them, the condition of the forest reserve fence, and whether or not there was an obligation on the lessee to keep that fence up to keep cattle out of there, what would be your opinion of the fair market [35] value as of, say, the middle of December or thereabouts, 1941?

The Witness: I believe it was worth three dollars an acre.

The Court: You think it would have brought that on the market?

The Witness: I think so.

The Court: Well, that lease terminated that day. No, it didn't terminate. There was a lease, a 5-year lease on it. Now, are you figuring upon the assumption that that lease could have been continued?

The Witness: Yes, I think the chances were very, very fair that it would be continued. It was worth that money as of that date.

The Court: All right.

#### Recross-Examination

By Mr. Deuel:

Q. As I understand you, Mr. Clarke, in placing

(Testimony of John K. Clarke.)

your value now as of late 1941 or early '42 that you are or are not considering any factors that came about later on, that is, during '42, '43, '45?

A. That's correct.

Q. So I ask you, were you or were you not?

A. I was not.

Q. However, your value that you place there is the [36] same, basing it that way, as though it would be, as though you considered factors later on, is that right? I understood you earlier to testify——

A. Well, the chances were very, very good that the McCandless ranch would secure that lease again. They had it for a long period of time, outside of the period when Frank Woods took it over. But the chances were good.

Q. But what you mean, then, is that it had that value to the McCandless estate?

A. Well, I think it had that value to anybody else.

Q. I don't understand, then, why you bring in this point of the chances being good that the McCandless estate would get it again.

A. Well, it would permit of their feeling that they could bid up to that figure.

Q. What you are getting at, then, is that it had peculiar value to the McCandless estate for that reason?

A. Well, they are having the additional areas around it. Naturally, they were in a position to pay more for it than anyone else.

(Testimony of John K. Clarke.)

Q. On the general market, though, since they were in a position to pay more than others, would it not be true that the value to others on the general market would be less?

A. No, I believe any other ranch would pay that [37] figure.

Mr. Deuel: At this point, although Mr. Anthony doesn't think so,—

Mr. Anthony: I'd like to examine the witness if you are finished. I don't like this idea of arguing questions of law in the middle of taking testimony. Are you finished?

Mr. Deuel: Yes, you take the witness:

### Redirect Examination

By Mr. Anthony:

Q. Mr. Clarke, what was the McCandless estate doing with that ranch prior to the entry of the Army on the premises after the outbreak of war?

A. They were improving it.

Q. And what were you doing with respect to fencing?

A. I went down on two occasions and the area at that time was in one large paddock, which is not the best practice in ranching. Now, I suggested that they cut the area into four paddocks as a start. On my second visit they were then putting in the fences.

Q. And was that completed prior to the end of 1941?

(Testimony of John K. Clarke.)

A. I believe it was. I didn't go down again, but I believe it was.

Q. And what was the result of that operation insofar as the effect on the efficiency of the ranch is concerned?

A. Well, that permitted of the resting of the paddocks, [38] saving of the feed, and made it possible to move the cattle from one paddock to the other, which is an advantage in ranching.

Q. Did it have any effect in connection with the keeping of the cattle in corrals and other areas where they wouldn't get out to the forest reserve?

A. Definitely.

Q. That was one of the purposes of that, is that right?

A. That's right.

Mr. Anthony: No further questions.

The Court: Were those cattle out there store-fed?

The Witness: Just range cattle.

The Court: From the time of birth until they went to market?

The Witness: That's correct.

The Court: Would they be fit to go to slaughter off that range?

The Witness: Yes, yes. The improvement that was put in would naturally help that situation because it permitted of their moving the animals from one paddock to the other and resting.

The Court: Well, what type of grasses were out there?

The Witness: At the time were were improving



(Testimony of John K. Clarke.)

that, too. It was just the natural grasses that were there at [38] the time.

The Court: Improving by clearing?

The Witness: By planting.

The Court: Did they break the ground in order to plant?

The Witness: Yes, they'd have to do that, naturally. But that was the process that was going on at the time, the improvement in that area.

#### Recross-Examination

By Mr. Deuel:

Q. Mr. Clarke, what was the last time that you were down there in 1941?

A. I don't recall the particular time but it was in '41.

Q. And with regard to this fencing there, putting it there in the Makua area into four paddocks, you say that you think it was completed?

A. I didn't go down again. So in my own knowledge I do not know.

Q. Actually, then, from your own knowledge you do not know on December 7, 1941, what the condition was of the border fence at the upper or mauka end of the Makua valley ranch area and dividing that from the forest reserve?

A. Last time I was down there the fence was in the course of erection. But I didn't go again.

Q. Actually, though, you say you don't know what [40] there was at that time?

A. No.

Mr. Deuel: That's all.

Mr. Anthony: That's all.

(Witness excused.)

Mr. Deuel: Your Honor, I wanted to argue this point of law now.

Mr. Anthony: I'd like to argue the law and the facts when we get finished with the evidence, your Honor. Isn't that the way to proceed with the case?

The Court: Well, generally speaking if there is some point of law that would exclude a witness, why, that is a different proposition. I don't know what his point of law is. But I understood that Mr. Clarke and Mr. Marks were both to be examined.

Mr. Anthony: I'd like to put Mr. Marks on the stand. Then he can argue as long as he wants. I would like to get the evidence in of what we have got left of this case.

The Court: Well, I think we had better proceed with the evidence, then.

#### A. LESTER MARKS

a witness in behalf of the Plaintiffs, having previously been sworn, resumed and testified further as follows: [41]

#### Direct Examination

By Mr. Anthony:

Q. Mr. Marks, you have already been sworn in this case, have you not?      A. I have.

Q. Subsequent to the last hearing in this case, did you make any attempt to ascertain the sales of the McCandless ranch, sales of cattle?

(Testimony of Alfred Lester Marks.)

A. I did.

Q. What was the result of that investigation?

A. The records show that——

Mr. Deuel: Your Honor, I object to this coming in for the reason that again it does not relate to the valuation which we are getting at in this case. Any sales that Mr. Marks might talk about here are sales on the market; it would be cattle delivered to the market, or at least delivered in paddocks where the purchaser would come in and pick them right up. And what we are concerned with there, if there was a damage, is a damage not to the cattle at that point but cattle as they existed over the whole ranch area, some up in the forest reserve, and just as they were on the hoof. And that makes a great deal of difference. What he may have sold them for on the market I do not think has any relevancy and is not proper to this issue.

Mr. Anthony: Counsel is over-impressed by his theory of the case. He evidently thinks the evidence shows that [42] this was nothing but a wild wilderness up there. Your Honor asked the witness whether or not he had any figures.

The Court: Yes.

Mr. Anthony: And I told him at the conclusion of the last hearing to go back and find out his figures. I am trying to get at the evidence.

The Court: Yes.

A. The period from the first of November, 1941, to the corresponding period in '42, which was dur-

(Testimony of Alfred Lester Marks.)

ing the period that we had to get out of Makua, there were 547 head of miscellaneous cattle that averaged forty-five dollars a piece.

Mr. Deuel: How much, Mr. Marks?

A. Forty-five. In 1942 to 1943 period, there were 422 cattle that averaged sixty dollars a piece.

The Court: 422?

A. 422. That averaged sixty dollars a piece. In '43 to '44, there were 271 that averaged seventy dollars a piece.

The Court: Now, just a moment. Where did these cattle come from?

The Witness: They came from the Waianae District. That would be the Makua and the Kahanahaiki area plus the adjacent valley of Ohikilolo-Keaau.

Mr. Deuel: Your Honor, I'd like to interpose a further [43] objection at this point, that he is getting in now to a period much later than the period as to which the damage, if any, would relate, and a period, a war period when prices were acknowledged as going upward.

Mr. Anthony: We are putting on evidence as to the value of cattle. I am trying to tender this to the Court to show what was salvaged after these cattle were chased all over the countryside and sold by the McCandless ranch. And I will prove that they are the same kind of cattle that we are suing to recover for here.

Mr. Deuel: The valuation must relate, however,

(Testimony of Alfred Lester Marks.)

to the date of damage, if any, and not to what they might have brought on the market at a considerably different period of time.

Mr. Anthony: Well, if that were so we'd be suing for the whole ranch, because they took the place over. We are not suing for the whole ranch.

The Court: Are you through with that line of questions?

Mr. Anthony: No, not quite.

Q. (By Mr. Anthony): These cattle that you have referred to here brought prices from forty-five to seventy dollars a head. How do you account, Mr. Marks, for the fact that you fixed a value of a hundred dollars a head for the cattle that have been lost or destroyed by the Army activities in this case? [44]

A. Well, these cattle that we sent to market were just slaughtered. They were not fattened and marketed in the normal procedure. We had to get out of Makua and Kaena and Keawaula and Makuakala, and we concentrated on what we had left in the adjacent valley of Keaau and Ohikilolo. We no sooner got in there, then it was taken over in various parts, a portion of it to quarter the personnel who were in charge of the ranch in Makua, and a large portion of it by the Navy who took over the upper area and established a proving ground for captured weapons. Any time they would capture a new type of shell or a new type of bomb, they would go up there and prove it.

So that the cattle that we sent to market was the



(Testimony of Alfred Lester Marks.)

only thing we could do. It wasn't a normal marketing procedure. It was just salvage. We had to keep, to send some of them to market, to keep them all from starving to death.

Q. Those that you did send to market and derived these sales prices per head were cattle that had been chased all over the country there, is that right?      A. That is correct.

Q. What would the price have been had those cattle been marketed in the normal course of ranching operations?

A. I believe it would have been considerably more than this. And also some that were sent to market were some of the good bulls and some of the blooded stock that Mr. [45] McCandless had brought in at various times. You don't reflect the value of a good bull from the sausage meat you get out of it. This was a time of stress, and we were being pinched on all sides and we just had to send these things to market because we had no place to keep them. And that's why I put a figure of a hundred dollars a head on the figure that I put in the claim, as that's what I considered represented the value of those cattle at the time.

Q. Now, as to the value of the leasehold, do you have an opinion as to the value of the leasehold as of the date that the Army entered into possession and took over the ranch?      A. I do.

Q. What is that?

A. My figure was eleven hundred twenty-five

(Testimony of Alfred Lester Marks.)

dollars a month, which works out in the vicinity of two dollars an acre.

Q. And what would be the total valuation as of the date the Army took over, during the term of the lease?

A. For the five-year period my recollection is the total is around sixty-seven thousand dollars. It is sixty months at eleven hundred twenty-five dollars a month.

Q. And it is your opinion that a purchaser on the open market would have paid that price for that leasehold at that time, is that right? [46]

A. It is.

Mr. Anthony: No further questions.

#### Cross-Examination

By Mr. Deuel:

Q. I'd like to clarify this matter, Mr. Marks, with regard to your valuation of the leasehold. When you were on the stand last, the last time you testified with regard to that value, I understood that you were valuing it in consideration of the changing values that occurred throughout this five-year period.

Mr. Anthony: I object to that statement. He didn't give any such testimony.

Q. (By Mr. Deuel): In that case let me ask whether or not that was the way you valued it?

A. No, I don't think it was.

Q. Well, what I want to get at is whether or not

(Testimony of Alfred Lester Marks.)

your valuation then relates entirely to a value as of the date the Army went in or whether it is based on these changing conditions throughout the remaining five-year period?

A. My value was, is the value that a willing buyer would have paid, when that lease was taken over for the remaining portion of the lease. And it is based upon my knowledge of sales and auctions and the demand that existed at the time and prior to the blitz. [47]

Q. Then it does not take into consideration changing conditions after that time, is that correct?

A. No.

Mr. Deuel: That's all.

Mr. Anthony: That's all.

The Court: Have you got figures for average sales of Makua ranch in 1940?

The Witness: In 1940 to '41 the figure was a little over forty dollars.

The Court: What was about the rate that it had been for some years up to that time?

The Witness: I couldn't say. I had nothing to do with the ranching activity while Mr. McCandless was alive.

The Court: Now, tell me, did the Army take over all of the ranch land in the Makua lease?

The Witness: Yes.

The Court: Took it all?

The Witness: Took it all.

The Court: Specifically, took that whole leasehold?

(Testimony of Alfred Lester Marks.)

The Witness: They took the two leases.

The Court: The two leases?

The Witness: The leases were cancelled for use of the Army. The letter of cancellation——

The Court: That was in June, wasn't it?

The Witness: That was in June. They had been in [48] virtual occupation, though, since right after the blitz.

The Court: Been in occupation with notice to you to clear out by what date, now? How much time did they give?

The Witness: Well, we didn't have definite notice to clear out until, I believe, it was around May. We had about a month in which to——

The Court: After notice?

The Witness: After notice to clear out. After that time we had rather hoped that there might be some arrangement whereby we would have a joint occupancy and we would have——

The Court: In fact, they had no lawful authority of any kind to tell you to clear out until the Government turned the lease over?

The Witness: That is correct.

The Court: Cancelled your lease? They had begun no condemnation?

The Witness: They had begun—there was no condemnation on the Government lease.

The Court: They just went in?

The Witness: They just came in.

The Court: Well, by force—all right.

(Testimony of Alfred Lester Marks.)

Mr. Anthony: No further questions.

Mr. Deuel: That's all, Mr. Marks.

(Witness excused.)

Mr. Anthony: We have one more witness here, your Honor. [49] I have one more witness.

The Court: Very well.

RICHARD K. KIMBALL

a witness in behalf of the Plaintiffs, being duly sworn, testified as follows:

Direct Examination

By Mr. Anthony:

Q. Your name, please?

A. Richard K. Kimball.

Q. You were born here in Honolulu, Mr. Kimball?

A. Yes, on Oahu.

Q. And have you had any experience with ranching in this Territory?

A. Yes, I have, sir.

Q. Briefly summarize that, will you, Mr. Kimball?

A. I was born at Haleiwa and from the time I was a little child, I guess, I used to be on the land on the Oahu Railway Ranch, from Kahuku to Waikane. And I worked with Ronald Von Holt for two years at Kahua, from 1931 to 1932. I came to Oahu at that time and leased some land from Libby's at Waipio in which I ran cattle for three or four years and engaged in buying and selling cattle.



(Testimony of Richard K. Kimball.)

Q. Are you familiar with the McCandless Ranch?

A. Vaguely. [50]

Q. Have you ever been down there?

A. I have been past it but I have never been on the property thoroughly.

Q. Are you familiar with the general character of that land in that area, the Waianae area?

A. Yes, I am.

Q. Do you know enough about that land down there to have an opinion as to the value of that land as of December 7, 1941?

A. I wouldn't say I know enough about it to be able to render an opinion on the value.

Q. Well, thank you very much. I won't ask you a question, then. I understood you were. Don't you have an opinion on the value of this land? Did you lease any yourself, Mr. Kimball?

A. Nearby.

Q. In the vicinity?

A. Subsequent to that time I leased some land for our dairy.

Q. What year?

A. In 1944, I think it was, the latter part of '44.

Q. Is that government land?

A. Yes, Territorial land.

Mr. Anthony: Well, that's all. Thank you.

(Witness excused.) [51]

Mr. Anthony: We have no further evidence, your Honor.

Mr. Deuel: Your Honor, it appears now that

Counsel is in agreement with me with regard to the proper valuation date and that being the fact I will not need to press my point as I was going to argue.

The Court: Well, I think I understand the matter that you were going to argue, and the Court is familiar with that principle of law, so that I don't think you need to take time to argue that. Now, I do want argument by way of summing up both sides in this case.

Mr. Deuel: If the Court doesn't mind the interruption, I have a further witness, your Honor. We were putting Mr. Marks and Mr. Clarke on because Mr. Clarke was here, and I thought it would be necessary to argue this point.

The Court: All right. Go ahead.

MANUEL COSTA, JR.

a witness in behalf of the Defendant, being duly sworn, testified as follows:

Direct Examination

By Mr. Deuel:

Q. Will you please state your full name, Mr. Costa?      A. Manuel Costa, Jr.

Q. And your occupation and residence?

A. Dairyman in Honolulu.

Q. And how long have you lived in the Islands, Mr. [52] Costa?      A. Thirty years.

Q. You state that you are a dairyman? Have you had experience also in cattle?

(Testimony of Manuel Costa, Jr.)

A. Well, for twenty-seven years of my life in dairy cattle.

Q. I am speaking of stock cattle.

A. Yes, and few beef cattle, yes, sir.

Q. Has your experience entailed any buying and selling of stock cattle?      A. Yes.

Q. And over what period of time?

A. Oh, for the last ten years on beef cattle. On the dairy end for the last twenty-seven years.

Q. And those have been—have those been your principal occupations?      A. Yes.

Q. You state that you have lived around here for—      A. Thirty years in Honolulu.

Q. During that period of time have you become familiar with the Waianae side of the island, and do you know where the McCandless ranch is?

A. Well, I have never been in the McCandless ranch. I went as far as Waianae. I have never been in the McCandless ranch. [53]

Q. When you say you haven't been, you are speaking of the Makua area?      A. Yes.

Q. How much familiarity do you have with that area?

A. Well, I couldn't say anything about the area. I haven't been on the land there.

Q. How extensive, or about how much experience have you had, Mr. Costa, in the buying and selling of beef cattle?

A. Well, as I say, I have been buying and selling beef cattle for the last ten, fifteen years.

(Testimony of Manuel Costa, Jr.)

Q. Does that include buying them so on the ranches?      A. Yes, on the ranches, yes.

Q. On the hoof?      A. On the hoof, yes.

Q. Now, are you familiar with cattle values dating back to 1941, '42?      A. Yes.

Q. From your experience and your knowledge of values as of that time, Mr. Costa, can you state what in your opinion would be a fair average value for a herd of cattle, taking them on the ranch area, the area running up into the mountains, some of the cattle, that is, scattered all over just as they would range, some of the cattle being outside of the ranch area and up into the forest reserve, cattle of a type generally known as scrub type, somewhat inbred, and some [54] tuberculosis in the herd, taking the cattle as a whole, over-all herd, little newborn calves ranging up to the old ones; can you state what your opinion of value, taking them that way, you having to go in and get them, can you state what your opinion of value would be?

A. I have to go and get them. If I have to get the cattle in the forest where they are scattered all around and not knowing just what is in there, I'd pay twenty-five dollars a head in the corral after they are caught, not losing. Then the way I understand to bring them down from the mountains, pinned to an ox to bring them to the highway, why, that takes a lot of work, and the most you could pay for that kind of cattle is twenty-five, thirty dollars a head.

Q. Is that your opinion of a fair market value?

(Testimony of Manuel Costa, Jr.)

A. Yes.

Q. For cattle in that condition?

A. That's right.

Q. At that time?

A. That's right. Of course, in 1944 or '43 I bought some from Mr. McCandless in Kona where there really was odd cattle; there were steers and bulls, they were all mixed, and landed at Kawaihae at eighty dollars.

Mr. Anthony: How much was that?

The Witness: Eighty dollars at Kawaihae. That was [55] from the McCandless people, at Kona.

The Court: You mean on the boat at Kawaihae?

The Witness: They were caught, they were all in the herd, came down from the ranch.

The Court: Were they put on the boat?

The Witness: Brought them down to the boat. They paid eighty dollars for them. I paid eighty dollars for them.

Q. (By Mr. Deuel): That purchase, however, was——

A. In '43 or '44.

Q. And from your experience with cattle values, they were higher than they were in the period we just talked about, in '43, '42?

A. Yes, they were higher.

Q. Did you make any other large purchase of cattle along about 1942 or so?

A. Well, we buy twenty, thirty herds at a time.

Q. Specifically, did you make a purchase from Davis and Cooke, I believe?



(Testimony of Manuel Costa, Jr.)

A. Davis and Cooke, no. I bought it from Nobriga in Hawaii. I bought fifty heads.

Q. How many?

A. Fifty heads at one time. That was back here in '47. But then the price was higher at the time.

Q. To refresh your memory, Mr. Costa, I believe we discussed and you told me of having made a purchase, I thought you said from Davis and Cooke, for four hundred twenty-two head?

A. Oh, well, yes. That was 1945, '46.

Q. Oh, was it that late? A. Yes.

Q. I misunderstood you.

A. It was during the war. No, no, '41, just before the war I bought from Cook's ranch, Allen Davis and Cooke.

Q. Are you sure you remember when it was?

A. Yes, I bought from Allen Davis and Cooke. In fact, I can get the record. I bought four hundred twenty-two heads and they were real bred cows. They were pure breds, most pure bred cows, at sixty dollars a head.

Q. Four hundred twenty-two head at sixty dollars?

A. Four hundred twenty-two head at sixty dollars from Allen Davis and Mr. Cooke.

Q. You termed them pure bred cattle?

A. Well, they were all pure Black Angus.

Q. And did you have to go in and get those on the hoof?

A. No, they were all in the corral. We counted them in the corral at sixty dollars a head.

(Testimony of Manuel Costa, Jr.)

The Court: When was that? [57]

The Witness: Well, I think it was '42. The war was on, the war was on already, '42 or '43, the war was on, I remember. I remember that well, the war was on.

Q. (By Mr. Deuel): Do you recall with regard to that purchase when you were talking to them before they had rounded their cattle up, did they make a estimate of the number of cattle they had?

A. Yes, they made an estimate and after we run up the cattle we were short about forty, fifty head.

Mr. Deuel: You may cross-examine.

### Cross-Examination

By Mr. Anthony:

Q. You told us this was first in 1947. Now, wait a minute. First you said it was '47. Then you said it was '46. Then you said it was '41, and then you said it was '42 or '43. Now, I want to know which year this was.

A. Well, for that fact I can get the real agreement where I bought the cattle. I can get the agreement, and we have the books. I never went through the books to know what day exactly it was. But I know the war was on, if I don't make a mistake.

Q. It was after 1941? A. Yes, sir.

Q. And when did you buy from McCandless on Hawaii? [58]

A. McCandless on Hawaii, I'd say either '45 or '46. I bought eighty head from Thompson.

(Testimony of Manuel Costa, Jr.)

Q. You testified on your direct examination that it was '43.

A. Well, it's '45 or '46. I couldn't tell the right date but during the war.

Q. Wait a minute, Mr. Costa. The date is important to me.

A. Well, it was during the war. It was after '41 that I bought eighty head from Mr. Thompson in Kona.

Q. Now, they were just ordinary scrub cattle?

A. Yes, they were.

Q. Right?

A. They were scrub cattle. There were some bulls and steers and cows. They were all mixed.

Q. And you paid eighty dollars a head for them?

A. That's right.

Q. And you had to pick them up at the McCandless ranch, is that right.

A. The trucks picked them up from the McCandless ranch.

Q. You did?

A. I didn't. The trucks, my trucks picked them.

Q. Your trucks?

A. Express man picked them up. [59]

Q. You paid for it?

A. I paid for the trucks,—

Q. Wait a minute—

A. —but there were eighty heads.

Q. —wait a minute. You paid for the trucks to go down to Kawaihae—right?

A. Yes.

(Testimony of Manuel Costa, Jr.)

Q. And you paid the inter-island tariff from Kawaihae to Honolulu?

A. Oh, yes, that's true.

Q. That's eight dollars a head—right?

A. Five dollars seventy-five cents, I think it was at that time.

Q. Inter-island tariff?

A. I think it was five dollars seventy-five cents for beef cattle. Eight dollars a head was for dairy stock. Beef cattle is a different rate.

Q. All right. How much did it cost you to get those, to use the trucks to get the cattle from the McCandless ranch to Kawaihae?

A. If I don't make a mistake, I paid \$125 for the truck. They have to load them on the trucks, though.

Q. Wait a minute. After you got the cattle down here in Honolulu, you took delivery of them?

A. At the wharf. [60]

Q. At the wharf? Came down by the "Humu-ulu"—right? A. Yes.

Q. So those cattle that you purchased from McCandless cost you landed in Honolulu something around ninety dollars a head—right?

A. Yes, around.

Q. Now, why was it Allen Davis was selling you cattle, pure bred, at sixty dollars a head?

A. Because I bought the whole herd. I took the whole thing he had.

Q. Oh, he wanted to get out of the business, is that it?

(Testimony of Manuel Costa, Jr.)

A. Well, whether he wanted to get out of the business or not, I took the whole herd. I took the ranch over.

Q. He wanted to get finished with it?

A. Well, if he wants it or not, but I bought the whole herd, I bought the ranch over.

Q. Did he go out of the ranching business at that time?

A. And I still have the leased land.

Q. Mr. Costa, will you listen, please? Did Mr. Davis go out of the ranching business at that time?

A. Yes.

Q. What do you think those cattle were worth that you bought from Davis? [61]

A. Well, what I think it was worth—just what I paid for them at that time.

Q. You wouldn't have sold them for that?

A. No, I kept them. And I got rid, I sold them around, during the war, selling ten, fifteen at a time.

Q. How much did you get a head for them?

A. Got a better price for them.

Q. How much?

A. I don't remember how much right now.

Mr. Deuel: Just a minute. I object to that question, your Honor. That is bringing them up piecemeal, and it has no relevancy in regard to what the over-all herd is worth.

Mr. Anthony: No further questions.

Mr. Deuel: That's all, Mr. Costa.

(Witness excused.)



Mr. Deuel: Your Honor, that concludes the government's evidence also. At this point, before we go on to the final arguments, however, if your Honor is ready to receive it, I wish to renew my motion to dismiss the matter set forth in paragraph 3 of the petitioner's complaint.

The Court: What is that about?

Mr. Deuel: On the same grounds that I had moved for the dismissal at the conclusion of the Plaintiffs' case, your Honor. And for the record I would like to repeat those. I don't intend to go into the lengthy argument again. We [62] argued that at length before. But I would like it for the record. And I move that, to dismiss this paragraph 3 on the grounds that the facts, that on the facts and the law the Plaintiff has shown no right to relief, and more specifically on the following grounds: 1. That private law No. 433, 80th Congress, under which the action is brought, does not encompass a suit for, or recovery for use and occupancy. 2. There is no cause of action stated in paragraph 3 as against the Defendant, the United States of America. 3. General leases No. 1740 and 1741 mentioned in said paragraph 3 were in fact validly cancelled by action of the Commissioner of Public Lands for the Territory of Hawaii. 4. No compensable interest exists in favor of the Plaintiff as against the United States for the use and occupancy of the land covered by general leases No. 1740 and 1741. And, 5, the Plaintiff in fact acquiesced in the cancelling of the general leases Nos. 1740 and 1741.

And with the Court's permission I would like to file this motion and make it part of the record. (Handing a document to the Clerk.)

The Court: The motion hadn't been filed heretofore?

Mr. Deuel: It was an oral motion.

Mr. Anthony: It was argued at great length and overruled. It is the same argument we had at the close of the Plaintiff's case. [63]

Mr. Deuel: There was an oral motion before your Honor, and we argued it for probably two to three hours before. We did go into considerable argument on it. As I say, I do not propose to reargue the points at this time, but I do want to renew the motion at the conclusion of all the evidence.

The Court: You object to that in toto?

Mr. Anthony: Yes, your Honor.

The Court: Well, now, when do you want to argue this case as it stands before the Court?

Mr. Deuel: At your Honor's convenience.

Mr. Anthony: Is the afternoon agreeable to the Court?

The Court: This afternoon? All right.

Mr. Anthony: Two o'clock?

The Court: Two o'clock.

Mr. Deuel: That is agreeable to me.

The Court: Do you think you can get through with it this afternoon?

Mr. Anthony: Oh, yes, I should hope so.

Mr. Deuel: I don't know exactly how long I will

take, but I think probably around a half hour, your Honor.

The Court: All right.

Mr. Deuel: And may we have a ruling on that motion to dismiss that paragraph 3, your Honor? That motion was denied when originally made, but now we have it for reconsideration [64] at the conclusion of all the evidence.

The Court: Did you add any new material to it?

Mr. Deuel: No, it is the same motion and the same grounds.

The Court: Yes. All right. Just before we go, if you gentlemen are doubtful about finishing your argument between two and four, why, I can come at half past one.

Mr. Anthony: Well, I don't see that there is any doubt, any question about being able to finish it. I certainly am not going to take very long.

(The Court recessed at 11:30 a.m.)

#### Afternoon Session

(The Court reconvened at 2:00 p.m.)

Mr. Anthony: May I proceed, your Honor, for the Plaintiff in this case?

The Court: Yes.

(Mr. Anthony presented his argument on behalf of the Plaintiffs.)

(Mr. Deuel presented his argument on behalf of the Defendant.)

The Court: I don't like to guess in a matter of

this kind, but it is necessary to do some estimating, and in listening to the evidence on both sides the best determination [65] that I can make is that there were 302 head of cattle that were not recovered. Now, of those, from the testimony I think it is fair to assume that 5 per cent were unmarketable, that is, in the beef market, on account of tuberculosis. That would be 15 off that, leaving 287 head of cattle that should be paid for. And I estimate that, from the evidence, a fair value of those cattle running at large there is \$45 a head. My figures, if they are correct, make that \$15,915.

Now, there was spent in recapturing \$4,115. Roughly that would be about \$5 a head, somewhere in the neighborhood of that. Let's say \$5 a head, because it is just impossible to determine. Well, it would have cost something to have caught them if the Army hadn't come in. And from what I have heard of the method of getting many of them out—and many of them were wild, according to the evidence—having to rope them and put three lariats on them and leaving them overnight tied to a tree and then taking them out with oxen power, I assume that that would have cost at least \$2 a head, and \$5 a head spent on the rest. What did you say was the exact number of cattle that you recovered—773?

Mr. Anthony: 793.

The Court: Well, the excess cost over normal cost of recovering those would amount to, as I figure it, \$2,279. The cost of cattle—that would affect the



cost of cattle at \$15,915, plus \$2,279, those two figures being the loss on [66] cattle.

Now, as to the hogs. Assuming that there were 200 hogs, hogs ranging over the land, it appears that they had the opportunity and didn't take out the sows which were more valuable. Taking the figure of 200 that were lost, from the evidence, ranging from Mr. Marks' valuation of \$25 per capita down to other rather expert testimony of \$10, I am allowing \$15 per capita, that is, \$3,000 for hogs.

There were two horses lost during this time by a railroad accident. Of course, there is no direct proof that it was directly due to the fact that the Army soldiers had opened some gates and destroyed some fences which permitted the horses to come on to the right of way. As far as I heard, the only horses that you had on the ranch were those two that got killed. Is that so or not?

Mr. Marks: No, there were more.

The Court: You recovered the others?

Mr. Marks: We recovered the others.

The Court: Well, two of them that were lost. Taking your figures, Mr. Marks, at 125 a piece, \$250.

Mr. Anthony: What's that for the horses?

The Court: \$250 for two horses. Now, the bags, the kiawe beans, the posts, in the aggregate amounted to \$190. There is no evidence to the contrary. We are left, then, with the leasehold. There were 7,000—there were 4,792.72 [67] acres, isn't that so? Allowing \$2 per acre per year, and allowing four and a third years—that's about all I can get out of that, four and a third years—that



the ranch operator was excluded from use in operating the same, that makes a total of my figures, if my figures are correct, of the value lost in the taking away of the right of \$18,769.32.

Mr. Anthony: What was that figure again?

The Court: \$18,769.32.

Mr. Anthony: And that's four and one-third years at \$2 per annum?

The Court: No, wait. I should double that by two. I got here 37,000, \$37,538.64, at \$2 an acre, \$37,538.64. Now, in addition to that, as I get from the evidence, there was property, residence property on the beach there.

Mr. Anthony: There was.

The Court: And I don't know that there has been any testimony given as to that.

Mr. Anthony: There was, at \$125 per month.

The Court: I know, but other than Mr. Marks' estimate.

Mr. Deuel: There was. Mr. Marks testified to \$125 a month, and Mr. Child broke it down and testified as to one hundred dollars.

The Court: I believe that one hundred dollars a month is the best estimate of value.

Mr. Anthony: Your Honor, could I get that? I'm sorry. [68] Could I get that figure?

The Court: On the leasehold?

Mr. Anthony: On the leasehold, yes.

The Court: I figured 4,792.72 acres.

Mr. Anthony: That's correct.

The Court: Well, first I figured it for four and

one-third years' term, and I arrived at the figure of \$18,769.32. Then at \$2 per acre it doubled that.

Mr. Anthony: Wait, then there's a third of that.

The Court: Four and a third years.

Mr. Anthony: Was that the 18,000?

The Court: No, that gave me \$18,769.32; that's four and one-third times 4,792, and it gave me \$18,769.32, if my addition is correct.

Mr. Anthony: 21,400 as I get it.

The Court: Well, we will go over that again. I don't see how you can make it that. Yes, I made a mistake.

Mr. Anthony: I get 21,432—20,432.

The Court: \$21,538.64, is that right?

The Clerk: I got \$20,769.32.

Mr. Anthony: I got 20,432. That's multiplied by two.

The Court: Well, here are the figures, here are the base figures: four and a third times 4,792.92, the result of that doubled by two. That is the product of four and a third times the number of acres. [69]

Mr. Anthony: I get a figure of 20,765.

The Clerk: 27,769, that's what I get.

Mr. Anthony: I didn't bother with the fractions.

The Court: Didn't bother with what?

Mr. Anthony: I didn't bother with the point 92.

The Court: I did. The correct figure is \$21,538.64.

Mr. Anthony: That is multiplied by two.

The Clerk: The total is \$21,538.64.

The Court: \$21,538.64. Now, 60 months times a hundred dollars a month for the house is six thou-

sand. I am not punishing the McCandless ranch—at least, I have no intention of it—by reason of any depreciation of value that did result, existing on the 8th day of December at the time the entry was made. Now, with the war on, that house could not have been rented for anything if the Army hadn't gone in, couldn't have been rented for more, and the very fact of the war did depreciate it. We all know that. It is a matter of common knowledge that the Court must take notice of. But I think that is a fair and reasonable amount to allow for the house during the remainder of this term, \$6,000.

Now, the figures that I've got, if we sum them up are, \$69,172.64.

The Clerk: That is right, your Honor.

Mr. Deuel: What was that total? [70]

The Clerk: \$69,172.64.

Mr. Deuel: \$69,172.64, that is the total of everything?

The Court: Total of everything.

Mr. Deuel: I didn't get your first total on the 287 head of cattle.

The Court: I didn't take 287. I took——

Mr. Anthony: You took 302 and you subtracted——

The Court: I took 302 and subtracted five per cent.

Mr. Deuel: That made 287 head.

The Court: And then I multiplied that sum by 45, which gave me \$15,915.

Mr. Deuel: I had a total on that from my

multiplication—I am probably wrong—but it is \$12,915. It might be worth recomputing.

The Court: Let's go over that again.

Mr. Anthony: \$12,915.

The Court: I did make a mistake there. I did make a mistake. It is \$11,915.

The Clerk: No, twelve thousand.

The Court: I should say \$12,915. That would be the first figure instead of 15. And to that is added \$2,279. Well, that simply takes three thousand off. The total addition, then, is \$66,172.64. I find for the Plaintiff in that sum.

Mr. Anthony: Shall I prepare and submit to your Honor [71] findings of fact and conclusions in conformity with the rules?

The Court: Yes.

(The Court adjourned at 4:15 p.m.)

### Certificate

I, Albert Grain, Official Court Reporter, do hereby certify that the foregoing is a true and correct transcript of proceedings in Civil 886, A. Lester Marks, et al., vs. United States of America, held in the United States District Court, Honolulu, T. H., on April 3, 1950, before the Hon. Delbert E. Metzger, Judge.

June 20, 1950.

/s/ ALBERT GRAIN. [72]

April 19, 1950

The Clerk: Civil No. 886, A. Lester Marks, and others, Plaintiff, vs. United States of America. For entry of judgment and findings of fact and conclusions of law.

Mr. Deuel: If the Court please, I have one very brief matter before we take that up. Your Honor will recall that the Government made a motion to strike Paragraph 3 of the plaintiff's Complaint, both at the conclusion of the plaintiff's case and again at the conclusion of all of the evidence, which motion was overruled. The Court allowed the plaintiff to amend the Complaint, and that was done, subsequent to the Court's decision, and I have not had a chance before now to clarify the matter. I merely wish the record to show that the Government's motion to strike runs also as against the Complaint as amended. That is all I had in that regard, but I want to be sure that it so runs.

The Court: All right.

Mr. Anthony: We have no objection to that, your Honor.

As to the findings of fact and conclusions of law and judgment, the Court will recall in the course of the Court's oral decision that he made certain mathematical computations based upon areas. A check by Counsel for the Government and myself has revealed several minor mathematical errors.

The Court: Yes.

Mr. Anthony: Which have been corrected in the findings of fact and conclusions of law and the



judgment, which I have handed to the Clerk for entry. The findings of fact and conclusions of law and the judgment, as handed to the Clerk for entry this morning, have the approval of the Government, except, of course, subject to the motions which they have made.

The Court: Yes, very well. The Clerk points out that there is a typographical error on the last page of the findings and conclusions in the sum set out there.

Mr. Anthony: The Clerk will change that on the typewriter, your Honor. The judgment figure is correct.

The Court: All right.

(Thereupon, at 9:05 a.m. the hearing in the above-entitled matter was adjourned.) [74]

#### Certificate

I, Lucille Hallam, Official Reporter, United States District Court, District of Hawaii, Honolulu, T. H., do hereby certify that the foregoing is a true and correct transcript of my shorthand notes taken in Civil No. 886, A. Lester Marks, etc., Plaintiffs, vs. United States of America, Defendant, held April 19, 1950, before Hon. Delbert E. Metzger, Judge.

June 29, 1950.

/s/ LUCILLE HALLAM.

[Endorsed]: Filed June 30, 1950.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK, U. S. DISTRICT  
COURT TO TRANSCRIPT OF RECORD ON  
APPEAL

United States of America,  
District of Hawaii—ss.

I, Wm. F. Thompson, Jr., Clerk of the United States District Court for the District of Hawaii, do hereby certify that the foregoing record on appeal in the above-entitled cause, consists of the following original pleadings, transcript of proceedings, and exhibits of record in said cause:

Complaint, Exhibit A, and Summons.

Answer.

First Amended Answer.

Motion to Dismiss.

Amended Complaint.

Findings of Fact and Conclusions of Law.

Judgment.

Amended Judgment.

Notice of Appeal.

Order Extending Time to Docket Record on Appeal.

Designation of the Contents of the Record on Appeal.

Amended Designation of the Contents of the Record on Appeal.

Transcript of Proceedings—February 14, 15, 16, and 17, April 3 and 19, 1950.

Joint Exhibits "A," "B-1," "B-2," "B-3,"  
"C-1," "C-2," and "C-3,"

Plaintiffs' Exhibits "A," "B," "C," "D," "E,"  
and "F."

United States Exhibits Nos. 1, 2, 3, 4, 5-A, 5-B,  
and 5-C.

In Witness Whereof, I have hereunto set my  
hand and affixed the seal of said District Court, this  
8th day of September, 1950.

[Seal]     /s/ WM. F. THOMPSON, JR.,  
Clerk, United States District Court, District of  
Hawaii.

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[Endorsed]: No. 12,680. United States Court of  
Appeals for the Ninth Circuit. United States of  
America, Appellant, vs. A. Lester Marks, Elizabeth  
Loy Marks, and Herbert M. Richards, Trustees of  
the Estate of L. L. McCandless, Deceased, Appellees.  
Transcript of Record. Appeal from the United  
States District Court for the Territory of Hawaii.

Filed September 13, 1950.

          /s/ PAUL P. O'BRIEN,  
Clerk of the United States Court of Appeals for the  
Ninth Circuit.

In the United States Court of Appeals  
For the Ninth Circuit

No. 12680

UNITED STATES OF AMERICA,

Appellant.

vs.

A. LESTER MARKS, ELIZABETH LOY  
MARKS and HERBERT M. RICHARDS,  
Trustees of the Estate of L. L. McCandless,  
Deceased,

Appellees.

#### APPELLANT'S STATEMENT OF POINTS

The appellant respectfully submits the following statement of points upon which it intends to rely on appeal:

1. The district court erred in holding that the plaintiffs' claim for loss of personal property did not fall within the prohibition of the jurisdictional act against an award for losses "which arose out of the combat activities of military personnel of the United States."

2. The district court erred in finding substantial evidence to support the award to the plaintiffs for loss of personal property.

3. The district court erred in holding that the withdrawal by the Territory of Hawaii of lands covered by General Leases No. 1740 and No. 1741 for the use of military personnel of the United

States did not constitute a withdrawal for the public purposes of the Territory as provided in the Hawaiian Organic Act and in the leases.

4. The district court erred in holding that withdrawal by the Territory of Hawaii of lands covered by General Leases No. 1740 and No. 1741 for the use of military personnel of the United States did not constitute a withdrawal "for any public purpose" as provided in the leases.

5. The district court erred in holding that the occupancy and possession by the United States of the lands described in General Leases No. 1740 and No. 1741 was without lawful authority.

6. The district court erred in holding that the plaintiffs did not acquiesce in the cancellation of General Leases No. 1740 and No. 1741.

7. The district court erred in holding that the plaintiffs are entitled to compensation for the withdrawal of General Leases No. 1740 and No. 1741.

8. The district court erred in denying the motion of the United States to dismiss the complaint insofar as it seeks damages for cancellation of the leases.

9. The district court erred in holding that the complaint states a cause of action against the United States.

10. The district court erred in denying the claim of the United States for a set-off to the extent of the value of buildings and other facilities which it



constructed on lands of the plaintiffs as an aid in terminating their ranching operations.

11. The district court erred in awarding the plaintiffs against the United States the sum of \$18,434.00 for loss of personal property and \$47,-460.29 for loss of the leaseholds together with interest on those amounts.

/s/ A. DEVITT VANECH,  
Assistant Attorney General.

/s/ ROGER P. MARQUIS,  
Attorney, Department of  
Justice, Washington, D. C.

[Endorsed]: Filed September 22, 1950.

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[Title of Court of Appeals and Cause.]

DESIGNATION OF THE RECORD  
TO BE PRINTED

The United States of America, appellant, hereby designates for printing the complete record and all the proceedings and evidence in the action, including this designation and appellant's statement of points.

/s/ A. DEVITT VANECH,  
Assistant Attorney General.

/s/ ROGER P. MARQUIS,  
Attorney, Department of  
Justice, Washington, D. C.

[Endorsed]: Filed September 22, 1950.

